LITTLE HOOVER COMMISSION



CALIFORNIA'S \$4 BILLION BOTTOM LINE:

GETTING BEST VALUE

OUT of the PROCUREMENT PROCESS

March 1993

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Nathan Shapell Chairman

Richard R. Terzian Vice Chairman

Senator Alfred E. Alquist Assemblyman Gil Ferguson Albert Gersten Senator Milton Marks Angie Papadakis Barbara S. Stone

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March 31, 1993

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The Honorable Pete Wilson Governor of California

The Honorable David Roberti
President Pro Tempore of the Senate
and Members of the Senate

The Honorable Willie L. Brown Jr. Speaker of the Assembly and Members of the Assembly

The Honorable Kenneth L. Maddy Senate Minority Floor Leader

The Honorable James Brulte Assembly Minority Floor Leader

Dear Governor and Members of the Legislature:

Each year, California spends about \$4 billion on goods, services and construction projects, making purchases through a procurement process that is highly regimented, hemmed in by paperwork and costly for everyone involved. While the State's procurement laws pay lip service to the concept of cost-effectiveness, the actual process -- as it is designed and carried out -- hampers purchasing decisions that would result in the State receiving the best value for the money it spends.

For the past eight months, the Little Hoover Commission has examined the State's procurement process, paying particular attention to electronic data processing equipment purchases, the program that promotes state purchasing from disadvantaged businesses, and the Prison Industry Authority, which sells other parts of state government \$150 million a year in products. Since the Commission's study focused on the policies and procedures used by the State in making decisions rather than on individual purchases, the Commission neither sought nor found the kind of waste exemplified by the \$2,000 coffee pots or \$500 hammers from federal purchasing scandals. Nonetheless, the evidence of something awry with the procurement process -- and a resulting higher cost to the State --abounds throughout the Commission's report:

* After spending years on a multiple-submission, much-evaluated and thoroughly discussed procurement process for a new internal telephone network, the State rejected two out of three bidders as non-responsive. The third bidder, granted the contract, is running almost two years late in implementing the system.

- * The State's top high-technology expert has identified four information technology systems where hundreds of millions of dollars were spent on equipment and software that was not capable of meeting the State's needs.
- * One state licensing board has purchased a computerized telecommunications system in bits and pieces over several years, with the system never becoming fully operational because of mismatched and/or missing equipment.
- * A state university has been forced to pay higher-than-market prices to the Prison Industry Authority for dormitory mattresses that have worn out in just a few years.

From extremely large procurements to small and almost inconsequential purchases, the Commission found many examples of the State ending up with less than it bargained for. The Commission has not attempted to estimate the higher-than-necessary cost of these and similar purchasing decisions. But multiplied throughout the huge bureaucracy, it is not unreasonable to presume that millions of dollars are wasted during the procurement process.

The Commission's report contains seven findings and 26 recommendations, each of which is highlighted in the Executive Summary. The overall thrust of the report can be summarized in three areas:

- 1. Best Value. The State must switch its focus, energy and efforts from the procurement process itself to the end product that the buying department receives. Managers must be given the responsibility and authority to make best-judgment decisions that allow the weighing of many factors besides costs. Accountability will be assured through an open, documented process that involves a panel of people evaluating bids.
- 2. Streamlined Process. The high costs now incurred by both the State and the vendors should be slashed by streamlining the existing, multiple-submission procurement process. When the State's policy makers add complexity to the procurement process with programs designed around social goals, they should place particular emphasis on tightly administering and monitoring such programs to ensure goals are reached without wasting resources.
- 3. Program Accountability. The Prison Industry Authority should be held strictly accountable for meeting the goals outlined for the program in statute. These include saving the State money and training prisoners. Currently, the program shifts costs to other state departments that must purchase its goods and services, and even then only survives with the help of hidden subsidies. There is no documentation or tracking of the program's effectiveness in training prisoners in a useful manner for the outside world.

Like any budget-minded family in today's recession, the State must begin to act like a savvy customer, weighing costs, service, reliability and other values before reaching decisions. With \$4 billion in purchasing power, the State should be viewed and treated as a valued customer who drives a hard but fair bargain, rather than as a patsy that will be satisfied with whatever is offered at a price inflated by regulations and paperwork. The Commission urges the Governor and the Legislature to implement the philosophy and recommendations outlined in the accompanying report.

Sincerely,

/Nathan Shapell

Chairman

California's \$4 Billion Bottom Line:

Getting Best Value
Out of the Procurement Process

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Executive Summary

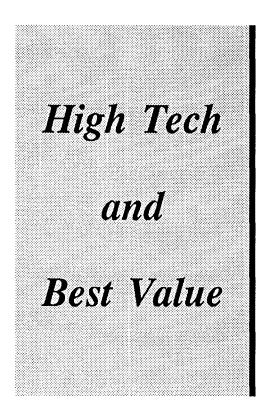
Executive Summary

o buy \$4 billion a year worth of goods, services and construction activities, the State has set up a procurement process that emphasizes fairness, low cost and achieving a set of social goals. None of these necessarily means that the State gets the best product to meet its needs or maximizes the use of its limited resources. Each of them adds cost (directly or indirectly) and complexity to the procurement process, resulting in delays and inefficiency.

In this report, the Little Hoover Commission acknowledges the need for the State to be fair in its dealings with suppliers as it spends public money; to be a comparative shopper in order to stretch dollars as far as possible; and to influence private actions through public policies encouraging small businesses, recycling and cultural diversity. The first priority, however, must be obtaining the *best value*: selecting the product that provides the most benefits for the lowest life-cycle cost. The procurement system should be designed to encourage officials to make best value choices rather than forcing them to focus on the paperwork-intensive process itself.

From this perspective, the Commission examined four areas of procurement: major computer and telecommunications equipment purchases; the protest process; the program designed

to encourage minority, women and disabled veterans participation in state business; and the Prison Industry Authority. As a result of its investigations, the Commission has made seven findings and 26 recommendations.



inding 1: The present state procurement system focuses on low cost rather than on best value for the State.

Procurement experts and academics believe that, to make the best information technology purchases, governments need procurement systems that rely on knowledgeable, well-trained decision-makers who have been given the leeway to determine which bids offer the best value and are trusted to use good judgment (as opposed to hemming them in with rules and processes designed to protect against bias and influence).

While the State has acknowledged this theory by creating a separate set of laws to address the purchase of electronic data processing equipment, in practice the State's procedures for buying complex computer systems continues to rely heavily on low-cost evaluations rather than best-value judgments. A major reason for this is the State's emphasis on accountability: Decisions made on the basis of objective data -- such as pricing -- are much easier to document and defend then are decisions made on subjective assessments of who might perform best or how much better one piece of equipment rather than another will meet the State's needs.

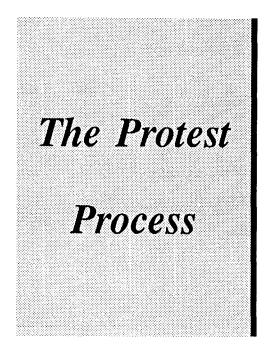
The result can be wasted expenditures for inappropriate information technology systems or the failure to maximize the use of emerging technology because of lack of government expertise.

Recommendations:

1. The Governor and the Legislature should enact legislation that declares that the primary goal in conducting state

- procurements is to obtain the best-suited product at the best price.
- 2. The State Administrative Manual should be changed so that state agencies may use a non-commodity, best-value evaluation procedure at their own discretion.
- 3. The Governor and the Legislature should direct the Department of General Services to streamline the procurement process to avoid multiple submissions.
- 4. The Governor and the Legislature should enact legislation that directs contract language negotiations to take place only after bids have been awarded.
- 5. The Governor and the Legislature should enact a resolution that would proclaim the State's intent to use functional specifications rather than detailed technical specifications in procurements.
- 6. The Governor and the Legislature should direct the Office of Information Technology to ensure that Requests for Proposals match the scope and intent of the Feasibility Study Reports.
- 7. The Governor and the Legislature should direct the Department of General Services to make increased resources available to those who write specifications for procurements.
- 8. The Governor and the Legislature should direct the Department of General Services to maintain equipment standards matrices only as an advisory guideline for departments.
- 9. The Governor and the Legislature should direct a modification of procurement procedures that would allow departments to purchase reconditioned equipment at their own discretion.
- 10. The Governor and the Legislature should enact comprehensive legislation to reorganize, simplify and streamline statutes relating to procurement.
- 11. In consultation with vendors, state departments and other procurement interests, the Department of General Services

should review contracting and invoicing procedures and create standardized formats to be used by all departments.



inding 5: The State's contract award protest process is fragmented, is informal to a point that credibility is undermined, and is hampered by the perception -- if not the reality -- of being a kangaroo court that is unfair and/or ineffective.

California's procurement protest process is spread among a variety of bodies. Where a bidder goes to complain about a procurement process or decision is dependent on the type of contract involved and the stage

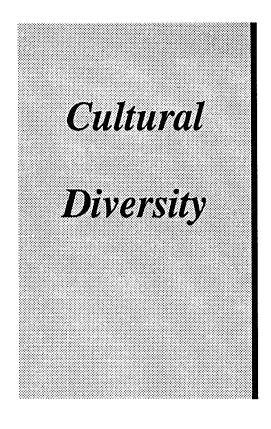
of the process being protested. The protest process in general has few of the procedural guidelines and structured policies that usually are essential for a system to have predictability and credibility. The "final" decisions of the protest system often involve no resolution of the problem and are tainted by an appearance of conflict of interest -- all of which result in a perception that the State's protest mechanism is unfair and/or ineffective.

Recommendations:

- 12. The Governor and the Legislature should enact legislation to centralize and provide uniformity to the bid protest process, as well as to upgrade the technical expertise of those involved in the process.
- 13. The Governor and the Legislature should direct the State Board of Control to institute formalized hearing procedures, record precedent-setting decisions, order remedies for bid award errors when appropriate and in other ways standardize the operation of the bid protest process.
- 14. The Governor and the Legislature should enact legislation to create an independent, binding arbitration process for those

protestors who are willing to pay the costs of an alternative process.

- 15. The Governor and the Legislature should enact legislation that would require the release of all relevant records to bid participants within a time frame sufficient to allow the filing of a detailed protest.
- 16. The Governor and the Legislature should enact legislation to require documentation of reasons when all bids are rejected and a project is put out for rebid.



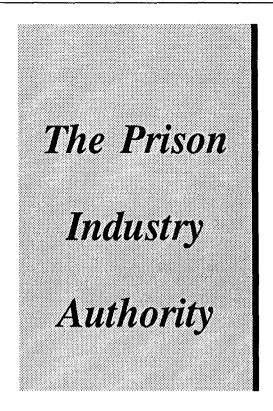
inding 6: The Minority
Business Enterprise/
Women Business
Enterprise/Disabled Veteran
Business Enterprise program is
failing to meet the goals set by
law.

As the MBE/WBE/DVBE program enters its fifth year, almost all state departments are failing to reach the 15-5-3 percent goals for contracts. The program's administration is fragmented and its provisions are applied unevenly; in some cases, the law has simply been ignored while in others advantage has been taken of loopholes.

The program's good-faith effort and certification components and the lack of enforcement mechanisms all impose undue burdens on state departments, vendors and MBE/WBE/DVBEs, adding to state and private sector costs without producing the desired results. Although recent revisions promise some performance improvement, other sorely needed reforms pose a dilemma by threatening the program's viability.

Recommendations:

- 17. The Governor and the Legislature should pursue one of three options:
- Option A: Enact legislation to contract for a disparity study and a recommended proportionate remedy as a prelude to adopting an aggressive, anti-discrimination procurement program.
- Option B: Enact legislation that will recast the present MBE/WBE/DVBE program so that it operates similarly to the Small Business preference program.
- Option C: Enact legislation that centralizes the authority and accountability for the MBE/WBE/DVBE program and provides adequate resources for outreach and enforcement efforts.
- 18. The Governor and the Legislature should eliminate the goodfaith effort component of the MBE/WBE/DVBE program or reform the process so it achieves its intended purpose.
- 19. The Governor and the Legislature should enact legislation to abolish self-certification and set up a single-point full certification process.
- 20. The Governor and the Legislature should direct the Department of General Services to embark on an aggressive enforcement program.
- 21. The Governor and the Legislature should enact legislation that allows firms to file "global" plans with the Department of General Services as an optional way of complying with MBE/WBE/DVBE requirements.
- 22. The Governor and the Legislature should enact legislation to protect past and current vendors in the event the State's MBE/WBE/DVBE program is found unconstitutional.



inding 7: The Prison Industry Authority, heavily and unwillingly subsidized by other areas of state government, is unable to document its degree of success in meeting program goals.

The Prison Industry Authority has a captive customer base in other state departments, which are forced to buy its goods and services. These customers, who have no leverage over PIA's performance, contend the products are overpriced, deliveries are often delayed and that quality is sometimes poor. The PIA defends its record,

claiming that prices are actually low for the quality of goods sold and that its activities save the State almost \$48 million a year. But the PIA is unable to show success in preparing prison inmates for the outside world, and its claims of providing cost savings evaporate quickly under scrutiny.

Recommendations:

- 23. The Governor and the Legislature should enact legislation that allows state departments to purchase goods from the Prison Industry Authority on the basis of best value for the department.
- 24. The Prison Industry Authority should require its annual audits to recognize and document the subsidies it receives.
- 25. The Governor and the Legislature should enact legislation to give the Prison Industry Authority the responsibility of creating a hiring process that reflects real-world conditions.
- 26. The Governor and the Legislature should enact legislation requiring the Prison Industry Authority to report on program outcome statistics.

Introduction

Introduction

here a person does the weekly grocery shopping is determined by a variety of factors: habit, proximity, prices, available selection of goods. Often without conscious consideration of each of these factors, a decision is made to go to one store rather than another.

Similarly, when a private business turns to its suppliers for goods or services, many factors beyond price may be considered: past performance, timeliness, quality, potential for doing business together in the future. The bottom line for any decision is a judgment of what works best for the company.

The State, when it acts as a buyer, faces the same considerations as an individual or a private business considering a purchase. What is the cheapest price it can pay? Will the product do the job it is being purchased to accomplish? Is the quality such that it will last for an appropriate number of years without requiring frequent repairs? Will it be delivered on time or be operational on schedule? In other words, what will work best for the State?

State's purchasing decisions not based solely on low cost or best value

It unlike an individual or a private company, the State cannot simply gather comparative data and then make a decision to buy based on impulse, best guess or even best judgment. Instead, the State must also take into consideration other doctrines that

have been laid out in statute or directed by policy makers. These include:

- * Fairness to all potential suppliers. Many involved with procurement have expressed the belief that since the State is spending public funds, it has an obligation to see that no favoritism enters into the selection of who will receive the funds. This belief most often is expressed as the need to provide "a level playing field" so that all businesses are playing by the same ground rules and have an equal opportunity to become state suppliers.
- * Competitive bidding. Although the State spends millions of dollars each year on "sole-source" contracts, for the most part who gets the State's business is decided in a competitive bidding process. Whether informally by telephone or more formally through voluminous documentation, the State seeks bids from suppliers that it can compare and use to make buying decisions.
- * Achieving certain social goals, such as reflecting cultural diversity in suppliers, giving an edge to small businesses and encouraging the use of recycled products. In each instance, the State's policy makers have decided that the value of achieving the social goals outweighs whatever costs may be added to the procurement process. This value may be simply in terms of fairness or may be a more complex judgment that long-range costs are driven down by extra efforts to expand the pool of suppliers and increase competition over time.

Purchasing policies are defensible despite added costs and complexities

n the abstract, each of these elements is easy to defend. No one argues that it would be better for the State to be unfair in choosing suppliers. But the focus on fairness down to the last, myopic detail of each procurement process contributes to the growth of acrimonious protests and the multiplication of paperwork dedicated solely to proving that a just decision was made. A fitting analogy can be found in the medical world, where doctors argue they must order multiple, expensive tests and practice defensive medicine because of the heavy threat of malpractice. Similarly, a state procurement official may be caught up in the process of dotting the i's and crossing the t's to enable the defense of a purchasing decision rather than focusing on what would best suit the State's needs.

Competitive bidding also appears to be an inarguable "good." Why should the State choose any method other than making suppliers give it a price that can be compared to other suppliers' prices? But a system that works well when buying pencils, where it is easy to compare like products, falls somewhat short when it is used to buy complex, computerized systems that could work in any number of ways to fill a need. To be able to compare bids on equal products, the State must rigorously mandate detailed specifications. But such detailed specifications may preclude options -- including some of great potential value to the State -- that suppliers could offer if they were not hemmed in by rigid requirements.

Finally, the *social goals* represent public policy that has been set by the Legislature to redress past wrongs or shape the future. The goals, however, often are adopted without information available on added costs and other ripple affects. For instance, if businesses in targeted, economically disadvantaged areas of the State are given an edge in bidding, how much is the added cost to the State? And how many jobs do those added dollars yield -- or what other measure can be used to demonstrate the added value the State receives in return for the added expenditure?

The State, then, is not a simple consumer who will make purchases based on lowest cost or best value. Instead, the State has added other functions to its role as a purchaser. Each of these other functions adds cost, complexity, delay, a need for thorough documentation and an adversarial tone to the State's procurement process, none of which exist in the private sector.

Despite massive purchasing power, the State does not always get best deal

he practical effect of these layers of considerations is that the State, despite its massive purchasing power, often does not get the best price, the best product or the best service. As the head of the State's procurement office has pointed out, a person can go to a discount retail store and buy a gross of pencils more cheaply than the supply officer of a state department is able to buy them for use by state workers.

The Little Hoover Commission believes that at a time when perpetual budget shortfalls are crippling state programs, it is critical that the State minimize wasted resources and maximize the economies of scale afforded by the State's bulk purchasing power. In mid-1992, the Commission therefore initiated a study of the State's procurement practices. The Commission convened an

advisory body of state officials, private suppliers, lawyers, procurement experts and other interested parties (please see **Appendix A** for list of those who participated).

Commission's scope and methodology for study

B ased on information provided by the advisory committee and its preliminary investigation, the Commission chose to focus its study on four areas:

- * Major procurements. The State spends about \$300 million on telecommunications and electronic data processing equipment each year. Typically a purchase that involves cutting-edge technology, intense competition and high-dollar costs, major electronic equipment procurements during the past decade have proven contentious, sometimes ending in litigation, critical audit reports and unsatisfactory systems that cannot achieve the desired goals.
- * The protest process. If a supplier does not win a contract from a private company, he is left with few options except to try harder the next time. The same contractor has more options when it comes to a lost state contract: He can use the State's protest mechanism or file a lawsuit. The current protest process is fragmented and is viewed with skepticism or outright scorn by many of those who make use of it.
- * The minority, women and disabled veterans program. The State has set goals of 15 percent for minority owned businesses, 5 percent for woman-owned businesses and 3 percent for disabled veteran owned businesses as suppliers for the State. The program, which is only four years old, has yet to mature into a smoothly working mechanism that broadens the pool of suppliers.
- * The Prison Industry Authority. Selling about \$150 million in goods and services to state and local government entities, the Prison Industry Authority has often been characterized as holding state departments hostage to high prices and delayed deliveries. Current state law forces departments, with few exceptions, to buy products and services from the Prison Industry Authority regardless of price.

The Commission conducted two public hearings on these topics, one in Los Angeles in September 1992 and the other in Sacramento in November 1992 (please see Appendix B for a list of witnesses at each hearing). In addition, the Commission's State Procurement Advisory Committee met several times, both as a whole and in smaller, working group meetings. A review of literature and numerous interviews also added to the Commission's investigative efforts.

The study has resulted in this report, which begins with a transmittal letter, Executive Summary and this introduction. The following sections include a background, four chapters of findings and recommendations, and a conclusion. The report ends with appendices and endnotes.

Background

- * The State spends about \$4 billion each year on goods, services and construction contracts.
- * Several programs affect the selection of a winning bidder, including preferences for small businesses, disadvantaged areas and recycling.
- * A pattern of troubled procurements and less-than-satisfactory purchases in recent years indicates that policies are not working well.
- * The State's top priority appears to be conducting a "perfect" procurement process rather than getting the most cost-effective products and timely results.

Background

he State spends about \$4 billion to procure goods and services each year through 80,000 separate transactions.¹ These purchases take place in a variety of ways, with oversight mechanisms differing depending on the amount of money involved, the size of the department making the purchase and the type of purchase. Approximately one-quarter -- or \$1 billion -- of the purchases are handled by the State Office of Procurement, a unit within the Department of General Services. Other procurements are handled independently by large state departments and the State's two university systems.

Among the mechanisms in place that allow departments to procure goods and services are:

- * The State Stores, an operation that purchases, warehouses, resells and delivers to state departments supplies, such as paper, pens, printer ribbons and paper clips. More than 1,300 different items are stocked, including 750 general office and janitorial supplies, 500 state forms and 60 canned food items. Between \$9 million and \$10 million in stock is kept on hand at any one time.²
- * Master contracts and master service agreements, which establish set prices for repair services and items such as personal computers, copiers and

other equipment. Departments order directly from the suppliers who have won the master contract rather than going through an individual procurement process.

- Purchase Orders, which allow departments to spend up to \$100 with little or no paperwork after soliciting bids by telephone.
- * Invitation for Bids (IFBs), which are used for commodities that can be easily compared to each other.
- * Request for Proposals (RFPs), which in theory are supposed to detail a department's "business problem" and invite suppliers to submit creative solutions, including hardware, software, management, etc. In practice, RFPs often are heavily weighed down with precise specifications that may pre-ordain the eventual product that is purchased.

Depending on a department's size and demonstrated past ability to handle procurements, purchases may be carried out under the "delegated authority" program. Under this program, departments handle their own purchases up to \$10,000 without going through the Office of Procurement (the limit is \$250,000 for electronic data processing equipment). In 1991, \$218 million in purchases were made using delegated authority.³

State has several programs that affect the selection of contract winner

In addition to having different mechanisms for procurements and varying lines of authority for purchases, the State also has a variety of programs that affect which bidder will be designated as the winner of a contract. For instance, the Small Business preference gives California-based firms that have been certified as small businesses a 5 percent preference on bids, as long as the cost differential does not exceed \$50,000 per contract. This means that if a large business bids \$1 million and a certified small business bids \$1,040,000, the small business wins the contract at an extra cost to the State of \$40,000.

The Department of General Services tracks the effect of the Small Business preference and has concluded that on an annual basis this preference shifts who the contract is awarded to on about \$30 million worth of contracts at an added cost of about \$500,000.4 In 1991-92, \$367.7 million in contracts were awarded to

certified small businesses, or 9.3 percent of the almost \$4 billion in procurement contracts.⁵

A similar preference program is aimed at businesses in economically disadvantaged areas that have been designated by the Governor's Office of Planning and Research based on census data. Called the Target Area Contract Preference Act (TACPA), this preference gives a bidder a 5 percent edge on price. In addition, the bidder may receive an extra 1 to 4 percent preference for hiring people with a high risk of unemployment, provided that at least 50 percent of the labor required to perform the contract will be performed in or within commuting distance of a distressed area. (The actual scale is an additional 1 percent preference if the high-risk unemployed make up 5 to 9 percent of the work force, 2 percent if 10 to 14 percent, 3 percent if 15 to 19 percent and 4 percent if 20 percent or more.)

The total additional cost of TACPA to the State may not exceed \$50,000 and the preference may not be used if its use would deny a small business bidder the contract.⁶ While not having statistics that include all state departments, the Office of Small and Minority Businesses indicates that this preference is used infrequently. In 1991-92, seven contracts worth \$7.59 million were awarded based on TACPA preferences.⁷

On contracts for paper and paper products, a bidder may receive a 5 percent preference for using recycled paper at a maximum cost to the State of \$100,000 on each contract. However, if granting a recycled-paper preference exceeding \$50,000 would preclude a small business from receiving the award, then the recycled paper preference is limited to \$50,000. (As an ecological side note, the State also prohibits agencies from contracting with businesses that have violated water pollution laws.)⁸

While not a preference program, the other major statutory requirement affecting contracts is the Minority Business Enterprise/Women Business Enterprise/Disabled Veterans Business Enterprise (MBE/WBE/DVBE) program. This program, which sets goals for participation in state contracts, is discussed at length later in this report.

Preferences may be combined, as long as the total added cost to the State does not exceed \$100,000 for any one bid.

Limited resources affect how widely preference programs are used hile the Commission did not choose to focus on the various preference programs, it did note that the extent to which they are used is affected greatly by resources. For instance, out of an estimated 700,000 small businesses in California, only about 12,000 are on the active certified list. The Office of Small and Minority Business identified the lack of funding to perform educational outreach as the reason for low participation in this and the TACPA preference program. In addition, strained resources have affected the office's ability to process small business applications, creating a four-month backlog of 4,000 small businesses waiting for certification or recertification.

Since the preferences were created to carry out state policies and reach certain -- although undefined -goals, it appears counterproductive to underfund the efforts that could lead to a greater use of the preferences. state decision-makers believe small business participation in state contracts is healthy for the State's economy, that state dollars flowing into disadvantaged areas creates jobs where they are most needed, and that the environment is assisted when state spending encourages recycling, then it seems logical that the State should invest the resources that would maximize the use of the preference programs. Instead, it appears that programs are created with the best intentions but are neither adequately carried out to assure that they have the desired affect nor monitored to assess their degree of success in fulfilling their intent. The result is to add to the complexity of state procurement processes without necessarily producing the desired benefits.

Procurement process has been shaped in response to past practices and problems

administrative procedures that govern procurement did not develop overnight. Those who have been familiar with state procurement practices over several decades have likened the present system to the far swing of a pendulum toward intensive accountability and well-documented regimentation as opposed to a less-regulated system in the late 60s and early 70s that was embroiled in controversies and scandals. Favoritism in procurement then was both the perception and the reality, according to those who track procurement practices.

In 1977, the Department of General Services created a task force of state officials, a study panel of outside procurement experts and a committee of American Bar Association contracting experts to examine and recommend ways to overhaul the State's procurement practices. Known as the California Public

Contract Project, this extensive effort resulted in 31 recommendations about procurement practices in general and an additional seven recommendations focusing on electronic data processing purchases. Some of the recommendations included (please see **Appendix C** for the report's executive summary of recommendations):¹⁰

- * Reorganizing all laws pertaining to purchasing into a single state act.
- * Placing uniform contracting procedures into regulations, which require public input, rather than in internal policy manuals.
- Providing standardized model contract clauses.
- * Setting up an independent commission to systematically review the procurement process on a periodic basis.
- * Creating a scheme of selection criteria for personal services contracting that would include merit as well as pricing.
- * Performing an economic and operational study of socio-economic programs (such as preferences for small businesses and recycled paper) to determine effectiveness and costs.
- * Adopting uniform protest procedures for all types of contracts.
- * Enabling the courts to direct an appropriate award of a contested contract.
- * Creating a program for on-going research and training in government procurement law and procedures.
- * Enacting a comprehensive, separate procurement act for electronic data processing.
- * Developing sample contract provisions to permit flexibility to accommodate various sized procurements and degrees of complexity.
- * Centralizing electronic data processing procurement functions.

Few recommendations from major 1977 study have been implemented

exceptions, some few recommendations have been implemented despite the high profile given to the study and its participants. Even the exceptions have not resulted completely in the changes sought by the study's authors. For instance, the first and most major recommendation was to recodify and reorganize statutes into a single act. This was done; however, many legal experts feel the recommended consistency, clarity and simplification that was supposed to accompany this overhaul of state law was never achieved. Similarly, separate statutes were created to address the unique aspects of purchasing electronic data processing systems. However, the underlying intent of having decision-makers use flexible mechanisms for making complex purchases on the basis of factors other than low cost has not been fulfilled.

The Commission draws attention to this previous, landmark study because the Commission has found, based on its own independent investigations, that many of the goals sought in the report remain valid today, 16 years later, although the recommendations themselves in many cases may need to be updated. These goals include creating a procurement system that is:

- * Easily understood and managed.
- Fair to participants.
- * Flexible enough to allow the State to make the best decisions as a well-informed consumer.

Pattern of troubled procurements points to problems with existing process

hat the State's system of procurement falls short of these goals is evidenced by a pattern of problem-plagued procurements over the past decade. The following highlights only a few of the controversial procurements:

California State University Computers: In the mid-1980s, the California State University system sought to revamp its computer systems with a procurement known as Educational Administrative Systems Environment (EASE). Control Data Corporation, one of two bidders on the \$24 million system, accused the State of having a procurement process heavily biased toward IBM, the other bidder, through the use of detailed specifications that favored IBM equipment. Eventually, Control Data Corporation withdrew its bid after unsuccessful protests and requests for changes in specifications. IBM, which already had supplied other major systems to the university system, won the contract.

CALNET: In 1989, a long study and procurement process ended with the award of a contract to GTEL for approximately \$109 million over 10 years to provide a new telephone system known as CALNET for state This procurement, handled by the operations. Department of General Services, prompted a full range of protests, audits, hearings and court filings. The State's Request for Proposals (RFP), issued in September 1987 and amended 26 times over the course of the procurement process, resulted in 17 months of meetings, submittals, evaluations and resubmittals. Each of the three eventual bidders submitted no fewer than five separate proposals during the process. When the State finished its evaluation, it threw out both the high and low bidders as non-responsive and announced its intent to award the contract to GTEL, the middle bidder. 11

Protests were made using the State's bid protest process and the Superior Court system. In addition, hearings were held by the Legislature and the Little Hoover Commission during the procurement process and, after the bid had been awarded, an audit was conducted by the State Auditor General. Issues raised included:

- * The State's decision to only solicit for systems it could purchase rather than also entertaining proposals for leased systems. While the courts upheld the right of the State to limit the bids to purchased systems, critics -- including the Auditor General¹² -- contended the decision was reached without adequate study and documentation.
- * The decision that two out of the three bidders were non-responsive, despite the months of meetings and pre-evaluations that should have eliminated problems from the final bids. The unsuccessful bidders maintained that not only were they responsive and that deviations were not material, but that GTEL's successful bid suffered from the same kinds and degree of defects.
- * The lack of a Feasibility Study Report, a document required by the Office of Information Technology (within the Department of Finance) that examines the needs of an agency and explores the long-term effect of different options to meet those needs. While the project did not legally require such a study because telecommunications does not fall under the jurisdiction of the Office of Information Technology, the lack of such thorough planning was criticized in the Auditor General's report,

which concluded that the State may not have obtained the most cost-effective solution to meet its needs.¹³

None of the protests were successful in altering the outcome and on November 28, 1989, GTEL was awarded the contract, with an initial cost of \$66,987,694 to cover the first three years. Since then, the Department of General Services reports that there have been 10 amendments to the contract with an additional cost of \$325,906. Implementation dates, which originally called for three phases to be completed in January 1991, October 1992 and May 1992, have been revised many times. The first phase was completed on July 1, 1992 (18 months late) and the last two phases have been combined and are now expected to be complete in June 1994 (more than two years late).¹⁴

Department of Motor Vehicles: The Department of Motor Vehicles has been the focal point for several controversial procurements. During the early 1980s, both a computerized database system and a reflectorized license plate contract were criticized for alleged favoritism. More recently, the department conducted a procurement for "credit card" style driver's licenses that could store data about the driver on a magnetic strip. Like the CALNET procurement, the driver's license procurement involved multiple submissions of detailed technical proposals, draft proposals and final proposals. Seventeen final proposals from six different suppliers were submitted in June 1989. After an evaluation and benchmarking process, National Business Systems Inc. (NBS) was announced as the intended awardee.

Four other bidders filed protests with the State, which were rejected, and one bidder -- National Information Systems Inc. (NIS) -- has continued to pursue the case in court. In addition, the Auditor General issued a report in February 1990.¹⁵ Legislators also slated hearings and in other ways sought to intervene in the process. Issues raised included:

- * Whether there were actually two or more bidders as required by law since all bidders but the successful one had deviations from requirements, although the Department of Motor Vehicles did not determine whether the deviations were material or immaterial.
- * The fact that the successful bid was based on a single density magnetic stripe with abbreviated

data rather than on a higher density magnetic stripe that could hold a minimum of 268 characters of data as specified in the RFP and as bid by the other suppliers. The other bidders were not alerted that the State would allow abbreviated information and a capacity for fewer than 268 characters.

* The quality of the benchmarking demonstrations. Of 77 objectives that the bidder was supposed to prove ability to meet, only 64 were demonstrated; verbal assurances on the other objectives were accepted by the State. In addition, tests that were conducted and showed deficiencies were not deemed important enough by the State to deny the contract to the bidder.

The complexity of this procurement and the difficulty of resolving the issues raised is demonstrated by the different conclusions reached by the various entities that reviewed the procurement thoroughly and rendered judgments:

- * The Auditor General concluded that the Department of Motor Vehicles and the Department of General Services "did not always follow state procurement procedures and, as a result, may have to rebid the contract to ensure that the procurement is legal and in the best interests of the State...the State may not have received the best product at the lowest cost."¹⁶
- * The administrative law judge who conducted 39 days of hearings with 31 witnesses and 244 items of evidence recommended to the State Board of Control that all protests be denied. He wrote:

The procurement process was not perfect and all participants made mistakes, particularly the State. ... Despite the mistakes and imperfections, there was no proof that the procurement was not conducted in an entirely evenhanded manner, with all bidders having the same rules applied to them and a level competitive field. ... It was not established that there was any favoritism, inequality, unfairness or prejudice to one bidder over another in this procurement.

As the table shows, it took almost three years from the time the first RFP was issued until a bidder who could meet the State's needs was selected.

This list of troubled procurements could continue. A \$100 million system for child abuse case management for the Department of Social Services was the focus of protests, all of which were denied. A system to track child support payments, also for the Department of Social Services, has met with protests. A third system for the department, this one to automate the welfare application process, has been contentious. And newspapers recently highlighted the procurement process for the Department of Justice's Statewide Integrated Narcotics System when potential bidders claimed specifications were tailored after the products of one company. Eventually all bidders dropped out except that company, and Digital Equipment Corporation ended up with the \$50 million contract.²⁰

Commission focusing on policy issues rather than on faults with specific purchases

of these procurements to determine whether errors were made or bad decisions were reached, leaving those functions to the entities involved in the protest process, the Auditor General and the court system. The Commission instead focused its attention on the policy perspective of procurement, noting that the examples above raise serious questions about whether the State's procurement process meets the reasonable goals of being easily understood and managed, fair to participants, and flexible enough to allow the State to make the best decisions as a well-informed consumer.

The State itself has shown no smugness about the contentious and adversarial tone that has been cast over procurements. While insisting that procurements are conducted without bias, state procurement experts see the system as burdened with requirements and shaped in response to their belief that the Legislature places a higher priority on process than on results. The head of the Department of Motor Vehicles summed up the situation in a letter to the Commission:

Everyone involved in the State's procurement process, including the vendor community as well as State agencies, agrees that the current time-consuming and costly procedure is in dire need of an extensive overhaul. The basic problems cannot be resolved by making minor procedural changes. Basic change is required at a policy level. A decision must

be made regarding priorities: Is it more important to conform to current procedures with the inherent delays associated with accommodating a wide range of vendors and subjecting them to unnecessary expense? Or is it more important to obtain cost-effective and timely results? In today's procurement environment, these are competing themes.²¹

In the course of its investigations, the Commission addressed these policy issues, coming to the conclusions described in the following four chapters of findings and recommendations.

High Tech And Best Value

- * Information technology purchases are difficult to assess based on price alone, yet the State's procurement system is slanted heavily toward selecting low-cost rather than best-value bids.
- * The procurement system is cumbersome, slow and costly for the State and the vendors.

Recommendations:

- * Declare that the top priority in procurement practices is obtaining the best value.
- * Empower managers to make selections based on factors other than price.
- * Streamline the process to avoid multiple submissions.
- * Involve the Office of Information Technology in the creation of well-drafted, functional specifications.

High Tech and Best Value

mong the largest individual procurements made by the State each year are those that involve electronic data processing and telecommunications equipment. The State spends about \$300 million annually on computer and telecommunications technology. Between 900 and 1,000 transactions are for equipment costing less than \$100,000, while approximately 60 procurements annually involve more than \$100,000 -- usually millions of dollars.²²

These highly technical, complex procurements are among the most contentious that the State deals with, largely because apple-to-apple comparisons are difficult and cost/benefits are not simply a matter of looking at how much an item costs and how long it will last. Those simple comparisons can be made easily and with little controversy when off-the-shelf commodities are involved. When the State buys a commodity, such as pencils or even a personal computer, the specifications can be rather narrow and definitive. Bids that meet the specifications can be weighed, one against another, and the contract awarded to the responsive supplier who provides the State with the lowest price.

When it comes to high tech, price is not the most important factor n contrast, electronic data processing systems often involve much more than hardware and software. Management of data, the development of the system itself and other non-tangible services enter the picture, as does the question of ability to perform as promised.

Price, the most easily measured component of a bid, may be one of the least important factors in comparing bids. As one person sketched it out for the Commission:

Consider two cases involving the purchase of a small piece of wood. In the first case, the piece of wood is manufactured into a pencil, a number two lead pencil. One pencil is virtually indistinguishable from another and the best buy on a dozen pencils is the box obtainable at the lowest cost. It makes little difference whether a box of pencils is manufactured by Acme or Allied.

In the second case, the piece of wood is made into a musical instrument, a violin or a classical guitar. The quality of sound produced by a musical instrument is greatly dependent upon the experience and skill of the master craftsman who selects the wood and hand makes the sounding board. It makes a great deal of difference if a classical guitar is made by Vicente Arias -- and the value of an Antonio Stradivarius violin is self-evident.²³

Because high technology can be enhanced by the choices made in system design or by the way it is installed, managed and integrated, who provides the equipment and services to the State can sometimes be as important as what is provided. In addition, alternative solutions can be provided that may meet the State's needs equally but in very different ways. In both cases, a low-cost bid process does not allow the State the latitude it needs to pick and choose among bids.

The Commission has determined that while state law acknowledges the differences between buying simple products and complex technology, state practice does not always reflect that acknowledgement. This chapter details the Commission's four findings and 11 recommendations pertaining to procurement processes.

Finding 1: The present state procurement system focuses on low cost rather than on best value for the State.

rocurement experts and academics believe that, to make the best information technology purchases, governments need procurement systems that rely on knowledgeable, well-trained decision-makers who have been given the leeway to determine which bids offer the best value and are trusted to use good judgment (as opposed to hemming them in with rules and processes designed to protect against bias and influence). While the State has acknowledged this theory by creating a separate set of laws to address the purchase of electronic data processing equipment, in practice the State's procedures for buying complex computer systems continues to rely heavily on low-cost evaluations rather than best-value judgments. A major reason for this is the State's emphasis on accountability: Decisions made on the basis of objective data -- such as pricing -- are much easier to document and defend then are decisions made on subjective assessments of who might perform best or how much better one piece of equipment rather than another will meet the State's needs. The result can be wasted expenditures for inappropriate information technology systems or the failure to maximize the use of emerging technology because of lack of government expertise.

Academics focus on results over process, long-term relationships and best-value buying

cademic studies tend to focus on federal procurement practices but in many ways are relevant to California's policies and problems. A review of literature on the subject highlights three areas:

- * Most experts agree that when it comes to purchasing information technology -- computerized systems and telecommunications equipment -governments place too much emphasis on the actual procurement process and too little on the desired results.
- * Some experts believe that governments overlook the advantages of turning suppliers into "partners" and of having long-term relationships with vendors.

Experts also believe governments fail to understand the benefits inherent in the "best value" approach to purchasing.

In his book *Procurement and Public Management:* Fear of Discretion and Quality of Government Performance, Harvard professor Steven Kelman writes at length about the focus of today's procurements on the actual process of procuring, rather than on the need to buy the product that is best suited to meet governments' needs.

The problem with the current system is that public officials cannot use common sense and good judgment in ways that would promote better vendor performance....I am suggesting that too much weight is currently placed on equity and integrity at the expense of other values, such as the substantive quality of procurement performance.²⁴

The present system hinders managers who want to make rational choices

elman argues that there are other ways to halt fraud, corruption and kickbacks than the multiple layers of regulations that tie the hands of bureaucrats who are trying to make purchasing decisions. The present system, he says, does not allow bureaucrats to make the rational decisions they would make in their own life as private consumers, such as returning to a store where the service has been good or buying a product that has worn well over time.

The fear of discretion makes it more difficult to select the right vendor because public officials cannot use important information that could help predict vendor performance if that use requires judgment that the system forbids the officials to exercise. The most dramatic example of the information that may not be used is information regarding the past performance of vendors on earlier contracts with the organization. Such information is at the heart of countless decisions in everyday life about the future performance of others. Yet it is ruled out because biased or corrupt decision makers might pick and choose from a vendor's past actions as an excuse for an unfair contract award.

Moreover, unwillingness to allow officials the discretion to depart from "free and open competition" can prevent the government from obtaining more value from vendors. Officials cannot offer as an incentive for good performance a promise to award future contracts. For the same reason, vendors are less likely to invest in developing creative ideas that the customer had never conceived, as opposed to ideas for effecting what the customer has already developed. Indeed, the greatest costs of the current system may well be those least recognized by participants -- the creative ideas and suggestions that are never made, that suggest that participants may not know what they have missed. 25

One remedy: Replace rules with written justifications and multi-member panels

elman advocates eliminating most procurement rules in favor of two broad procedural requirements: written justification for each procurement decision and multiple-member evaluation panels to reach decisions. The first should supply enough information to ensure that fraud has not played a role, and the second should make bribery or corruption more difficult since there is no single player.

A special study and workshop on strategies for purchasing information technology by the John F. Kennedy School of Government, Harvard University, echoed many of the same themes:

...procurements have become too "rule-bound" -- that is, excessively mechanistic and controlled. They give too much weight to contracting values and not enough to program values. They handcuff all participants in a misguided attempt to insure that all potential vendors are given scrupulously equal treatment.

Rigid rules have not only failed to control favoritism, they have hindered the exercise of front-line judgment essential for success with complex, innovations-oriented procurements.²⁶

The study found that overemphasis on prior specification and documentation has led to procurements that are too slow, incapable of taking into account a vendor's past performance and unable to incorporate

information learned during the evaluation process. As one of the Harvard workshop participants put it:

It's hard to say when it happens, but you can put it down as an immutable rule. Somewhere in the course of complex procurements, while trying to determine how best to spend a substantial amount of the taxpayers' money, government ceases to be regarded as anything remotely resembling a customer and becomes instead the referee in a competition among prospective vendors: "These specs are proprietary." "These specs aren't clear." "We don't have enough time."

So it goes. What was it we were trying to buy again?

The present system prescribes one of two approaches. Either you ask in advance for what you want with sufficient specificity that a choice can be based solely on respondents' prices, or you ask for what you want in more general terms, in which case the choice is based upon broader, but still very objective weighted criteria, which are likewise specified in advance. Either process can take weeks or months. In the meanwhile, if you learn anything new which is important to your decision, either forget it or start over. Your job is to impartially apply the rules that you have previously laid down.

Having created this situation, it is little wonder we are frequently stuck with what we asked for instead of what we want and need.²⁷

The Harvard study advocated greater flexibility and discretion for purchasing agents, but it also recommended relying more on relationships and partnerships with private industry to meet its information technology needs. For example, a competitive selection process could be used to allow governments to select a vendor to meet a well-defined need. The actual method for meeting that need could then be developed cooperatively. Or a joint partnership could be formed where the government entity and a private firm develop a program to meet some specific need and then share the risks, costs and/or

profits. This would be distinctly different from today's procurements, which hold vendors at arms' length from the government/customer. But not everyone is comfortable with the concept or can envision how it would be structured. One of the Harvard workshop participants called it "an exceedingly important topic whose resolution is fraught with peril" and another called it "antithetical to both the project basis of procurement and the concept of competition." ²⁸

"Best value" systems allow a trade-off between price and desirable features he third area highlighted in academic circles is "best-value" procurements compared to "full and open competition." Procurement authorities Ralph C. Nash and John Cibinic, professors at George Washington University, write that best value refers to a system where a contract award decision is based on a trade-off between the price offered and other features of the proposal, such as quality, technical aspects, management potential and timing.

Such a trade-off is sometimes referred to as a "cost/benefit" analysis. It requires that judgment be made as to whether the price differences between competing proposals are justified by their other aspects....

The only alternative to best value source selection is the "lowest cost, technically acceptable" method. Under that technique, the proposals are separated into two those that are technically categories: acceptable and those that are not. Award is then made to the responsible offeror with the lowest cost, technically acceptable proposal. The source selection official is not required, or permitted, to make cost/quality or technical tradeoffs....While this method assures that the Government will not pay a higher price for slight technical advantages between proposals that are technically acceptable, it also requires the Government to accept significantly inferior items at monetary savings. What is worse, it only has the appearance of objectivity. determination of technical acceptability is highly discretionary and a technically unacceptable proposal can be excluded from the competitive range without consideration of cost.29

For a perspective on how best-value works in the real world, one can examine the federal Department of Defense's Defence Logistics Agency approach with its Quality Vendor Program. Under the program, vendors submit applications, supplying information about past performance and their ability to meet other criteria. Once the information is verified as being up to the program standards, the vendor is certified as a quality vendor, a status that is rechecked every six months. When a contracting officer is making a decision on a procurement, he or she is authorized to pay up to a 20 percent preference in order to award the contract to a vendor on the Quality Vendor Program. The award is at the contracting officer's discretion so that specific factors about each procurement can be taken into consideration, including whether paying extra for quality will be worthwhile.

Out of three million contracts since 1991, the Defense Logistics Agency has awarded almost 120,000 contracts to quality vendors. Only 594 involved the payment of a price preference (for a total of \$240,000 extra). Writing in a handbook explaining the program, the federal agency said:

Our statistics show that quality vendors usually offer the lowest price as well. While the number of times that awards have been made at a price preference seems small, our willingness to pay the preference has indicated our commitment to quality and has had an impact far beyond those few times we actually awarded to other than the low price....The benefit of best value programs to the Department of Defense is reflected in the reduced cost of contract administration, fewer late deliveries, fewer quality defects, reduced stock levels and costs as a result of more reliable delivery, and perhaps most importantly, greater confidence in the quality and reliability of the items acquired.30

Best-value systems increase competition by allowing a wider range of proposals

ome critics have worried that best-value purchases limit competition. But rather than being anti-competitive, the two George Washington University professors argue that best-value procurements actually increase competition. Because the decision maker is free to pick and choose among many options rather than tied to a single, overly defined set of specifications, a wider

range of proposals will be submitted from a larger number of suppliers. Nash and Cibinic add that decision makers should be required to explain their selection regardless of whether a higher- or lower-priced offer is selected.

Because some have the misguided belief that the lower-priced offer is always better, much of the focus has been on justifying the advantages received by award at a higher price. We think that if a lower-priced offer is selected, the source selection official should be required to justify why the dollar savings are sufficient to make up for the inferior performance the Government will receive. The only award that does not need explanation is when the best proposal is also the lowest priced -- the source selection official's dream. In real life, the selection decision is more likely to resemble a nightmare.³¹

In California, many people who participate in the procurement process and who spoke to the Commission feel that nightmare is not too strong an adjective for the State's process. But California at least has taken steps toward implementing current theories in the three areas - best-value procurements, partnerships, and process-rather than result-orientation -- although in practice the outcome may fall short.

State law specifically addresses the standard by which bids will be awarded. Section 10300 of the Public Contract Code says in part that it is the intent of the Legislature that there will be "full compliance with competitive bidding statutes as a means of protecting the public from misuse of state funds;" that all qualified bidders will have "a fair opportunity to enter the bidding process, thereby stimulating competition in a manner conducive to sound state fiscal practices;" and that "favoritism, fraud and corruption" will be eliminated. To achieve this intent, contracts "shall be made or entered into with the lowest responsible bidder meeting specifications (emphasis added)."³²

State law sets a cost-effective standard for high-tech purchases But new statutes were enacted in 1982 when the State recognized the need to handle computer purchases differently. Beginning with Section 12100 of the Public Contract Code, the law says:

The Legislature finds that the unique aspects of electronic data processing

systems and telecommunications systems and the importance of such systems to state programs warrant a separate acquisition authority for electronic data processing and telecommunications goods and services. The Legislature further finds that such separate authority should enable the timely acquisition of goods and services in order to meet the state's needs in the most cost-effective manner (emphasis added).³³

The law also lays out the standard for selecting a winning bid for high-technology equipment, saying the award should go to:

The proposal which provides the most cost-effective solution to the state's requirements, as determined by the evaluation criteria contained in the solicitation document. These evaluation procedures may provide for the selection of a vendor on an objective basis other than cost alone (emphasis added).³⁴

While the law comes close to the "best-value" concept, allowing for a selection on criteria other than price, it still continues to demand **objective** decision-making. This means that elements such as management expertise and past track records must be quantified and compared -- an exercise that creates the pretense that subjective decisions will be made objectively.

Effect of law is undermined by bureaucracy and mishandling

he Commission found that the original intent of the law -- to provide flexibility and better decision making -- is undermined in two ways. First, the use of the mechanism provided by the law is discouraged by provisions of the State Administrative Manual and by procurement officials at the Department of General Services; and second, when the mechanism is used, it is usually handled in such a way that there is little difference between it and a standard, low-price procurement.

Despite the "cost-effective" enabling language, most Request for Proposals stick to low-price selection. One procurement official for a state licensing agency who was handling the procurement of a computerized telecommunications system wanted to develop a point-based system that would allow the agency to determine which bid gave the most functional system for the least

amount of money. He envisioned setting up a panel from the Office of Information Technology, the Office of Procurement, the Division of Telecommunications and his own agency to evaluate the bids. The Office of Procurement turned him down, he said, based on advice from the office's legal experts that a point system would be too vague and arbitrary.³⁵

Another procurement expert from the California State University system said that despite state statutes, most procurements focus on what is least expensive rather than what is the most functional for the least expense. The least expensive alternative usually is also the least functional in terms of meeting the State's needs, he said. He advocates setting up a model point scoring method that could be frequently reviewed for amendment, well documented and accessible to everyone who participates in procurements.³⁶

One or two people's experience, of course, is not definitive. However, the State Administrative Manual, which lays out the accepted procedures for complying with state procurement laws, clearly comes down in favor of low-price evaluations:

For purposes of awarding a contract pursuant to a Request for Proposals, there are two methods for evaluating proposals and awarding contracts. The **preferred and primary method** (emphasis added) requires that the contract be awarded to the lowest responsible bidder meeting the standards. The second method requires evaluation of proposals by a committee with the award being made to the bidder with the highest score.³⁷

It is not easy for departments to win the right to use a weighted evaluation mechanism. Writes an official for the Employment Development Department:

Unfortunately, the Department of General Services requires departments to justify why they need to weight cost along with quality factors even though no such requirement is apparent in statute. Thus, DGS becomes the arbiter as to when quality considerations exceed price alone. Certainly bid specifications need to be written clearly and fairly. But the State's business needs should not be sacrificed in

order to ensure that low bids -- which may, in fact, result in greater total cost -- are always used.³⁸

Cost continues to dominate the process even when other factors are allowed

hose Requests for Proposals that do incorporate a multi-factor scoring method are almost always still heavily weighted in favor of low cost. For instance, an RFP may state that 100 points will be given during the evaluation for technical competency, past experience and innovation, while 200 points will be given for low price. By practice, the Office of Procurement says it allows at most a 50-50 scoring split between points for technical competence and points for low cost, but prefers a 40-60 or lower split so that price plays a bigger role.³⁹ This may mean that a company that could offer an innovative, higher-initial-cost concept that might pay off for the State in the long run will not do so, instead sticking with a more traditional, competitively priced option.

Another criticism of the seldom-used multi-factor scoring method is that the points scored for non-cost factors are handed out almost equally to all bidders, in essence converting the evaluation to a low-bid process. For instance, a recent procurement for fiscal intermediary services for Medi-Cal gave 200 points for technical merit and 300 points for cost. Of the two bidders, one had a commendable record of service for the past five years as the current contract holder and the other -- who had previously held the contract -- had been the focus of much criticism for backlogged payments and poor service. The technical points given to each proposal were only five points apart, according to the successful bidder, who added, "The track records alone should have made the proposals more than five points apart." 40 The result was that the contract went to the low-cost bidder (who, fortunately for the State, did have the better track record).

Why is the State loathe to rely on points for technical merit -- or when it does, eager to pass them out equally? Bidders speculate that state procurement officials are uncomfortable with subjective criteria that are difficult to "prove" and leave them open to protests and potential legislative criticism. No one can argue when one price is determined to be higher than another, but when one bidder gets more points than another for something that requires a value judgment or opinion -- such as whether they have a good record of past reliability -- then complaints can and do arise. The head of the Office of Procurement confirmed this viewpoint for the

Commission. "Our concern is meeting all of the statutory requirements for true competitive bidding and also we want to be able to defend our decisions against protests," he said.⁴¹

The partnership concept has not been popular with the State

rushed to embrace partnerships and long-term relationships with single suppliers, although the concept is not a new one in California and some teamwork has been tried for exploring the uses of advanced technology. Computer and telecommunications technology firms have long advocated such partnerships, including in testimony to the Little Hoover Commission.

For instance, one company believes that the Employment Development Department could save \$4 million to \$6 million annually if consolidated call centers were installed with a centralized database and computerized screening processes so that people who need to apply for unemployment benefits could be handled by telephone. The company would like to install a small system at its own expense for a field trial to prove the value to the State but could not make the investment knowing that it might be the loser in any eventual RFP process. A2 Not only would the company lose money, but it would also receive no reward for the creativity and innovation it brought to the State.

But when allowing such partnerships was recommended by a council of state departments, the Office of Procurement was blunt:

We oppose this concept because we are unable to conceive of a fair, ethical manner by which to select such a partner. It appears to encourage vendors to buy into a procurement in order to benefit from future sole sources and deprive other vendors of an opportunity to bid on significant business.⁴³

The benefits of partnerships: expertise, creativity and good service

the pitfalls associated with relationships/partnerships in procurement, the benefits could be substantial. First, it would provide governments with the in-depth, cutting edge expertise that they now lack when they try to make informed information technology decisions. Second, knowing in advance that creativity and innovation would be rewarded, companies would be more willing to propose solutions to problems in ways government has not been able to conceive. Today, such

creativity results only in the government amending a Request for Proposals so all suppliers can equally bid on whatever the innovation is. Third, companies would have an incentive to provide good service and treat government as a valued customer since future choices of vendors would be influenced by what kind of "partner" the company is.

What emerges from an examination of the State's attitudes toward best-value procurements and the potential of partnerships is a clear answer to the question of where the State focuses: on the process or on the results of procurements. The answer is that the process through which procurements are handled is of paramount concern. The deputy director in charge of the Office of Procurement testified to the Commission: "The Legislature has told us they want a fair and level playing field above all else. Until they give us some other direction, that's what we are focusing on."⁴⁴

As shown in the cases described in the background section of this report, the State's attitude toward procurement -- and the great emphasis on getting the process "right" -- often is an impediment to maximizing the State's resources, obtaining systems without delay and ensuring that the right technology choices are made.

Perhaps even more telling evidence that there is too great an emphasis on process and not enough on results is recent testimony given by the head of the Office of Information Technology. He named four procurements where the State tried to take advantage of new and emerging technologies, only to end up with expensive systems that are not capable of meeting the State's needs. These included a relational database for the Department of Motor Vehicles, a system intended to be a statewide repository of health records, a system to deal with corporate records, and the Department of Insurance's computerized consumer protection system. In each case, the State's procurement process failed to result in a system that fulfilled the expectations of the purchasing departments.⁴⁵

In addition, the Commission was told by two independent sources about the purchase of a computerized telecommunications system in a state agency that has never worked properly because it was bought piecemeal in separate procurements that resulted in components that could not interact.

Neither design nor implementation of procurement process results in best value

hile the Commission has neither the expertise nor the resources to examine fully individual procurements, it is difficult to look at the pattern of troubled procurements and unusable systems without concluding that the State's procurement process is not designed to achieve the best value for the State. And best value is an important goal. As an industry leader described the effect of best value:

It doesn't matter if we're buying for the government, business or our personal life -there is nothing more expensive than buying a product that doesn't work, regardless of the price we pay. Buying from the lowest bidder is tempting and easy. One can always rationalize that the difference in price between two levels of quality can be used to fix the lower quality if required. If not required, then we're ahead. Unfortunately, it's never that simple. In addition to repairs or reworks, there are costs associated with the impact of the poor quality. Furthermore, a consistent practice of buying on price regardless of performance tends to encourage low quality and poor performance. It takes time and effort to do it right the first time. Pure price competition discourages the extra effort, especially if the supplier knows that poor quality can be rewarded by additional funds to fix the problem.

Upgrading the State's procurement practice to include the best-value concept will not only improve the quality of the purchased goods and services, it will also upgrade the quality of the "core" supplier base. This base will be better equipped to compete for commercial orders both within and outside of California. 46

Recommendation 1: The Governor and the Legislature should enact legislation that declares that the primary goal in conducting state procurements is to obtain the best-suited product at the best

price.

his would change the existing emphasis on "costeffectiveness as determined by objective criteria" to a best-value system. The new law should allow state departments flexibility in determining whether what they are purchasing is a well-defined commodity that should be selected on the basis of cost alone or a noncommodity that should be judged on factors besides price. When dealing with a non-commodity, the purchasing entity should create a multi-disciplinary panel from several areas of state expertise to evaluate the costs and benefits of each bid. Once a selection is made, the purchasing entity should provide a written justification for the choice, including such factors as incremental costs versus added value. The law should explicitly provide for the use of subjective judgment by the panel in the pursuit of best-value purchasing decisions.

Hand-in-hand with the declaration of legislative support for best-value procurement and subjective evaluations would have to be an implicit commitment on the part of legislators to refrain from ordering hearings and/or audits at the first complaint from losing vendors. State procurement officials have made it clear that much of the defensive posture embedded in the current procurement system stems from their experiences with legislative reaction to charges of bias and unfairness. Instead, legislators should rely on the protest process and the court system to guard against corruption and malfeasance.

Recommendation 2: The State Administrative Manual should be changed so that state agencies may use a non-commodity, best-value evaluation procedure at their own discretion.

he present system ties the hands of state department decision makers. Instead, the system should allow decision makers the discretion to make the best choices. While the new system would lack the rigid internal controls now exercised, several factors will continue to guard against waste and the unwise use of state funds:

- * The written justification required in a best-value procurement will allow for public, media and competitor scrutiny of all decisions.
- * The multi-disciplinary nature of the selection panel will ensure checks and balances on any predisposition toward a specific vendor.
- * The added complexity of evaluating bids and justifying decisions in a best-value procurement will be a disincentive for department officials to use the system except when it would truly be beneficial.
- * Managers will face the same budgetary constraints they always have: If more dollars are spent on one piece of equipment, then fewer dollars are available for something else. Therefore, managers will only spend added dollars on enhancements that add value to what the department receives.

Finding 2:

The procurement process, particularly when it pertains to electronic data processing and telecommunications systems, is needlessly complex, time-consuming and costly for the State and the suppliers.

he State has a multi-step process for obtaining bids in response to Requests for Proposals for electronic data processing and telecommunications systems. The system was designed to ensure that the State could modify its concept of what was needed as new information emerged and that all suppliers would have an equally clear understanding of the RFP. Instead, the process has resulted in paper-intensive, costly, multiple submissions by suppliers and lengthy, costly, multiple evaluations by state personnel, with little evidence that the best interests of either the State or the suppliers are served.

State's process may require up to six different bid submittals n any electronic data processing procurement, there are potentially two phases that involve up to six different steps. There is always a Final Phase, which includes two steps: a Draft Bid and a Final Bid. There also may be a Compliance Phase prior to the Final Phase. The Compliance Phase may have a Conceptual Proposal, a Detailed Technical Proposal and revisions of either or both.

The Compliance Phase allows the State, working together confidentially with each bidder, to assess and discuss the bidders' proposed methods of meeting the State's needs. "It is a radical departure from the rigid 'either accept or reject' philosophy of traditional competitive bidding, yet it is highly competitive in nature," according to the State's outline of the procedures. "It provides the flexibility needed for the bidder to test his solution prior to formal submittal of his final bid, and it facilitates the correction of defects before they become fatal to the bid."⁴⁷

In a Conceptual Proposal, a bidder may be as innovative as the RFP leaves room for, knowing that if he is on a track that is totally unacceptable to the State, he will be told well before the Final Bid is due. After the

proposals are submitted, the State evaluates each, identifying non-responsive elements or areas where additional clarifications are needed. In a confidential meeting, these are discussed with the vendor, along with proposed support plans, implementation plans, validation plans, demonstration plans and proposed contracts.

The State's procedures manual explains:

The State will not make counter proposals to a bidder's proposed solution to the requirements. The State will only identify its concerns, ask for clarification, and express its reservations if a particular requirement is not, in the opinion of the State, appropriately satisfied. The primary purpose of this discussion is to ensure that the bidder's final bid will be responsive.⁴⁸

The outcome of the meeting is a Discussion Memorandum that notes all problem areas and agreed-upon plans for resolution or details of further steps to be taken.

The State at this point may notify the bidder that the proposal has been rejected if the State believes that there are defects that could not be remedied ever or in time for the final submission deadline. If the State believes more clarity is needed following the meeting and the issuance of a Discussion Memorandum, then it may ask for a revised Conceptual Proposal.

As a next step, the State may require a Detailed Technical Proposal, allowing each bidder to provide a detailed technical description of his or her plans. If there has been a Conceptual Proposal phase, then the Detailed Technical Proposal must match whatever was proposed in the first step. The submission is followed by the same procedures as the Conceptual Proposal: a state evaluation, a confidential meeting and a Discussion Memorandum, as well as a revised Detailed Technical Proposal if the State feels it is needed. Once again, the bidder may be told his proposal has been rejected if the State believes it is completely off track.

The Final Phase begins with the Draft Bid, an "almost final" bid that will be reviewed for faulty administrative aspects that might cause the Final Bid to be rejected if not corrected. The State's evaluation of the Draft Bid does **not** include a review of technical responsiveness, although the bidder is notified about any

technical defects that are noted. Passing the Draft Bid stage does **not** guarantee that there are no material deviations or other defects in the bid, and the State reserves the right to reject the Final Bid as non-responsive. The Draft Bid must conform to the Conceptual Proposal and Detailed Technical Proposal (if those steps were part of the procurement).

The Final Bid is the only document that includes cost information. It must conform to the prior submissions in the process and it must have all the elements required in the RFP.

Multi-step process is designed to assist flow of information but critics find flaws

n theory, then, the multi-step process is an opportunity to have an exchange of information flow between the State and potential bidders. Critics complain, however, that in practice the process:

- * Is an inefficient method of designing information technology systems. Other states put out an RFP to design a system and then issue a second RFP for implementation. California gets its design work "free" through constantly tinkering with the RFP during the Compliance Phase -- but the "free" design is actually costly in terms of time and state staff efforts, as well as having the potential of being a conglomeration of compromises rather than someone's best effort at maximizing the opportunities of high technology.
- * Allows bidders to pressure the State to make changes in specifications that may be beneficial to them or detrimental to other bidders. One vendor told the Commission his company spent thousands of dollars preparing preliminary submissions only to have a last-minute RFP amendment make it impossible for the company to submit a Final Bid.
- * Requires bidders to jump through the same hoops repeatedly, but with no assurance that their bid will be deemed responsive in the end.
- * Is getting longer and longer, and costlier and costlier. One witness told the Commission it is not unusual for a company to spend more than \$1 million to put together the many responses required for a multi-million dollar project. The RFP itself may fill one or two 3-inch binders, while the responses may take up seven or eight of the binders -- for each separate step of the two phases. 50 The timeline from the issuance of an

RFP to the date for a Final Bid can run more than a year.

A closer examination of one of the procurements outlined in the background shows the effect of the multistep process. In the CALNET procurement for a new statewide telephone system, the State began with a Request for Information in June 1987. Then the following steps took place:

SUMMARY OF EVENTS IN CALNET PROCUREMENT

DATE	STATUS
June 1987	State issues Request for Information, an option that allows the State to seek supplier input on possible solutions to the State's defined problem.
September 1987	An RFP later amended 26 times is issued.
November 1987	Conceptual Proposals are submitted by five vendors.
April 1988	Two suppliers drop out and only three Detailed Technical Proposals are submitted.
September 1988	Suppliers submit revised Detailed Technical Proposals.
November 1988	State provides each bidder with a detailed review and evaluation. Draft bids are submitted.
February 1989	Final bids are submitted after each draft bid has been reviewed for compliance with specifications and discussions have been held with bidders.

Source: Department of General Services

espite the multiple submissions, many evaluations and frequent meetings, the end result of this 17-month process was that two out of the three vendors were found to be non-responsive. The third (neither the high nor the low bidder) was given the contract.

In addition to the multi-step process, the State also requires all bidders to negotiate contract language before the contract is awarded. This means that if there are five bids submitted by five separate vendors, then state lawyers negotiate with five firms to arrive at final contract language even though only one contract will ever be issued.

Contract negotiations with each vendor before bid selection adds to costs

ritics complain that this method, not used in other states, is a complete waste of money and staff time, both for the unsuccessful companies and the State. State officials, however, maintain that negotiations must be carried on with everyone before a bid award so that there is no question of advantage being gained by a firm after a bid is awarded through the acceptance of contract language different from what other bidders thought they could get.

The State's system of handling electronic data processing procurements is a well-intentioned effort to save costs, give the State flexibility and ensure vendor responsiveness. But in practice, the system adds costs, delays and complexity without providing the State an easily managed, easily understood procurement system.

Recommendation 3: The Governor and the Legislature should direct the Department of General Services to streamline the procurement process to avoid multiple submissions.

he new process could include the following, simplified steps:

- A draft RFP.
- 2. Vendor input on modifications for the RFP.
- 3. Issuance of a final RFP.
- 4. A single submittal of a technical proposal without cost data.
- 5. A formal clarification process (if needed).
- 6. Evaluation of the proposals and rejection of noncompliant bids.
- 7. Notification of compliant vendors to submit cost proposals.
- 8. Publication of the ranking of technical proposals (which may include the State's evaluation of how much added cost it is willing to bear in return for different levels of added value).

- 9. Opening of cost proposals.
- 10. Evaluation of cost proposals in relation to technical ranking.
- 11. Selection of vendor.

This system avoids multiple submissions, yet still allows for clarification of errors or misunderstandings. It removes cost considerations from the early evaluation of technical details, but still provides best-value flexibility by allowing the State to weigh technical factors against added costs before reaching a decision.

Recommendation 4: The Governor and the Legislature should enact legislation that directs contract language negotiations to take place only after

bids have been awarded.

he law would provide the State with the option of going to the next highest best-value bidder if it wishes to reject the original successful bidder's contract language proposals. Vendors have indicated that such a system allows them to avoid the cost of contract negotiations on bids they will never win, while giving the State an added "club" to win arguments over contact language. Vendors are more likely to be flexible if they fear the loss of a multi-million-dollar contract that they know they have been selected to receive.

Finding 3:

Specifications in state Requests for Proposals are sometimes poorly drafted, too restrictive and not conducive to the State receiving the best product to meet its needs.

he requirements laid out in a Request for Proposals control the end product that the State will eventually receive. Besides directly detailing what is being sought, the requirements -- known as specifications -- have many indirect affects: They define how large the pool of bidders will be, set parameters on how much creativity and technological know-how will be used in responses, and limit the criteria by which proposals will be evaluated. Badly formed specifications, therefore, have an overwhelming impact procurement. Yet the State makes little effort to ensure that specifications are written to reflect accurately the State's needs and to give the State flexibility to entertain the widest range of creative proposals. The result often is overly restrictive specifications that may be perceived as biased toward one supplier's products.

A good definition of what the State needs is the key to a good procurement

he most important step in any procurement is defining what the purchasing agency is looking for. Academics write about this, suppliers intuitively know it and state officials recognize it -- and to some limited extent, even state policies and procedures reflect it.

Writing about the problems of low-cost purchasing and the focus on procurement processes rather than outcomes, procurement expert Steven Kelman says:

The current system encourages the government to try to describe in advance too many of the features and applications of the system that is to be developed, rather than realizing that it is foolish to believe one can understand all the potentials and pitfalls of a brand new system in advance of its implementation ... Grand designs are at best a recipe for not getting all one can from a new computerization project and at worst an invitation to costly disaster. ⁵¹

Kelman adds that the driver behind overly detailed specifications is the focus on a level playing field for all bidders, which requires purchasing agencies to as much as possible reduce evaluations of bids to objective, easily compared facts, such as price, rather than allowing evaluators to make subjective comparisons.

The philosophy of reining in discretion establishes an elaborate process of relating specifications and evaluation criteria to government requirements and encourages a structured effort to set down requirements in advance, often with a view that more detail is better. 52

Kelman points out that a side-effect of overly detailed specifications is that the process of putting together RFPs is so burdensome that many agencies try to wrap together all of their information technology needs into one gigantic procurement. This also works against getting the best end product, as noted by the John F. Kennedy School of Government at Harvard University in their study:

Instead of the long-term informal relationships favored by corporations, governments tend toward long-term formal contracts, often called "mega-contracts" or "grand designs." Specifications and contracts sometimes run forward for 10 or more years.

Almost always this is wrong. It results in Rube Goldberg approaches of bewildering complexity and botched performance. For most major systems, "Do it, try it, fix it!" is a better approach.

The grand designs have not risen by accident, however. They are partly a response to burdens imposed by the contracting process. There is strong temptation to spread the high fixed costs of procurement justification and audit over as large a project as possible.⁵³

Specifications need to focus on State's problem rather than defining a solution

cademics favor two solutions to the problems caused by detailed specifications. The first is to write functional specifications rather than detailed technical specifications. This means that specifications should describe what needs to be accomplished in general

rather than how it will be accomplished specifically. The second -- which is actually an echo of the first -- is to ensure that RFP itself focuses on the problem that the purchasing agency is trying to address rather than on some favored solution.

What does it mean to focus on a problem rather than specifying a solution? One example might be a licensing agency that wants to be able to handle more public inquiries about the status of license holders. The agency might presume that what it needs is a telephone system that will allow callers to be sorted according to the questions they have and then directed to an operator that can handle that question. If it constructs an RFP around that premise, it may never learn about a more sophisticated telephone system that allows callers to tie directly into a centralized databank and access the information needed without the use of more operators.

Vendors say specifications tie their hands and are drafted poorly he real-world affect of detailed specifications and "grand designs" was brought up repeatedly by vendors who communicated with the Commission. Their comments included:

- * The current process places the burden of determining the best solutions on the State -- yet the State does not have the expertise to know all the options or to determine the best combinations of technology.
- * Detailed specifications encourage protests of bid awards because the State must use subjective judgment to decide whether deviations are material, and therefore a bid will be thrown out, or non-material, and therefore a bid is acceptable.
- * Vendors are discouraged from being creative.
 Companies that believe they have a better approach to solving the State's problems than that called for in the RFP may find that their solution does not fall within the parameters of the specifications. They therefore do not even get a foot in the door to try to sell their approach.
- * Specifications may subtlely favor one firm or exclude others by requiring equipment or performance standards that can only be met by some companies.
- * State workers rely on advice and input from vendors because they lack the technical expertise

to write detailed specifications. This allows vendors to try to influence specifications so that they will favor their firms or exclude competitors.

The evaluation process is not always conducted with adequate expertise. Vendors hire the best technical people possible to put together their proposals, but the proposals usually are evaluated by people with little in-depth technical knowledge. The subtleties of different bids and nuances of how systems will perform are often evident to competitors but are missed by those who are supposed to be weighing the relative value of different proposals.

Suppliers spoke of RFPs with hundreds of specifications, including details like how large a space a computer terminal should cover when sitting on a desk (its "footprint") and how many buttons a computer mouse should have. If a supplier deviates from any specification -- either in the belief that a superior product will result or that costs will be lower while quality is the same -- the bid will be in jeopardy of being found non-responsive. If the State accepts a deviation by finding it "not material," then other, losing vendors may challenge the bid award by charging that the State did not hold everyone to the same standards.

Detailed specifications block State from pursuing other options as new ideas emerge he practical result of a system that tries to equalize all factors in bids before they are received is that the State is not allowed to have second thoughts about what it wants. Nor is it allowed to change direction if it receives new information after the RFP has been finalized. Nor can it suddenly decide to add a gadget it overlooked if it finds out that the added cost is slight but the added value is great. All of these options are open to individual consumers and to private businesses.

For instance, if a person is shopping for a videotape player, he or she may begin with a list of functions that are desirable. This list may lengthen or shorten as salesmen are consulted about price differentials, added options and expected quality. Then a purchasing decision is made based on a balance between what is needed, what is desired and what can be afforded. A rigid procurement system, instead, requires the State to figure out in advance exactly what it thinks will meet its needs, to estimate about how much it will cost so it can determine what features it can afford to seek, and then to write specifications that will force

bidders to give the State what it has determined that it wants.

Although the State has conducted dozens of procurements with highly technical specifications that could be used as examples, perhaps the one that most easily shows how micro-management-minded procurements can become is the State's RFP for the State Computer Store. This procurement was for a master contract that allows departments to purchase personal computers and other equipment from a single supplier without going through separate bid processes. The RFP, which filled a 3-inch binder, contained one section of 75 separate requirements that bidders must commit to meet, including:

- * Maintaining a showroom space of 1,500 square feet.
- * Scheduling at least three sales representatives to work in the store each work day.
- * Providing at least one hour free parking for State employees using the store.
- * Training the telephone receptionist to answer product pricing questions.

Other sections of the RFP required narrative descriptions of plans for operating the store, resumes of potential employees and other details.

This detailed RFP with its solution-oriented approach guaranteed that the State would get precisely what it asked for, including free parking for shoppers. But a problem-oriented RFP -- one that explained the State's goals of providing a convenient place for state departments to get top-notch service, technical advice and reliable products -- would have allowed bidders to take their best shot at convincing the State that their plan, with their own creatively designed details, would provide the best value in terms of costs and services. The State might have ended up with options that had never occurred to it, such as "house calls" for outlying state departments or free debugging programs.

Despite the evidence of overly detailed procurements, the State is not unaware of the academic theories, the vendor concerns and the real-world results discussed above. In response, the State has -- to some

extent -- set up a system to focus on meeting the State's needs rather than on solutions.

Feasibility Study Report forces departments to focus on needs

he RFP and its specifications are not the first steps in the chain of events that allows a state purchase new information technology. When a department decides that a new computerized system will streamline its workload and increase efficiency, the first external hurdle it must pass is the Feasibility Study Report (FSR). This document, completed with oversight by the Office of Information Technology, is designed to take a business-like approach to governmental functions. The FSR, when properly done, lays out the department's "business problem" and explores alternative solutions. It addresses issues such as: What are the mission and goals of the department? How does the need it is seeking to meet inter-relate with other functions? What are the short-term and long-term implications of the proposed solution?

By law, the Office of Information Technology, a unit of the Department of Finance, is in charge of policy and coordination for information technology throughout state government. (In contrast, the Office of Procurement, a unit in the Department of General Services is in charge of overseeing and/or carrying out information technology procurements. A separate General Services' Unit, the Division Telecommunications, is in charge of policy and procurement for telecommunications systems.) Office of Information Technology reviews Feasibility Study Reports with the perspective of ensuring that needs are well-defined and options are reasonable and thoroughly assessed. The Feasibility Study Report is not intended as a system design document but, since it is used in determining budget appropriations for new information technology projects, it does propose an intended solution.

Once the Feasibility Study Report has been approved and funding budgeted, the department can move ahead with the procurement process. The RFP and the specifications are developed by the department that is making the purchase, rather than by the Office of Procurement in its role of procurement oversight or by the Office of Information Technology in its role of information technology coordination. The supposed advantage of this system is that the department "knows what it wants" and so is in the best position to formulate the RFP and specifications. The disadvantages include:

- Since most departments make large information technology purchases only rarely, departments have the in-house technical expertise necessary to draft an RFP and specifications that will result in the best possible procurement process. Even for small computer acquisitions, technical assistance is largely unavailable for those who must put together the RFPs. Small departments that call either the Office of Information Technology or the Office Procurement are told that they do not provide assistance on drafting specifications.
- * While the RFP that is developed is supposed to be based on the Feasibility Study Report, no such linkage is ever assured. The State's top technical experts sign off on the Feasibility Study Reports, but none of them are involved in fashioning specifications or double-checking later to see that specifications match the business need identified in the reports.
- * A department "knowing what it wants" is not the same as a department "getting what it needs." The first implies that the department is fully informed of all choices in advance and has reviewed all options. Since this is rarely the case, the State's interests would be better served by a system that gives a department the technical support that it must have to develop a procurement mechanism that will help it get the information technology that it needs.

There is no system to assure that the planning process is linked to the RFP

he State, then, has a planning mechanism that is meant to focus on department needs but there is no assurance that the planning process is reflected in the RFP. The head of the Office of Information Technology recognizes this weak link in the State's procurement process. He told the Commission:

As a fundamental principle, the procurement specifications for project acquisitions should be exactly consistent with the requirements set forth in the feasibility study report, and the evaluation criteria in the procurement document should incorporate all of the management and technical factors, including cost, that are critical to project success.

In our judgment, failure to meet this principle is the cause of a substantial portion of the problems that departments have with the procurement process. Allowing the procurement specification to stray from the requirements specified in the feasibility study has the effect of abandoning the careful analysis that has gone before. Failing to identify and assign weights to critical success factors allows superficial or extraneous factors to become decisive in the selection of the successful bidder. Both open the door to formal protests or even project failure. 54

Thus, while the State has attempted to build a system that focuses procurement efforts on meeting the State's needs, its actual implementation continues to push procurements in the direction of detailed specifications and already-selected solutions.

Recommendation 5:

The Governor and the Legislature should enact a resolution that would proclaim the State's intent to use functional specifications rather than detailed technical specifications in procurements.

rocedures and guidelines governing how procurements are run should be modified to reflect the State's desire to have best-value procurements. Departments should be encouraged to delineate problems -- rather than solutions -- in Requests for Proposals, and suppliers should be given the broadest possible opportunity to suggest creative solutions. Such a system makes the evaluation process more subjective and more demanding (in that evaluators must understand the nuances of all proposals), but the added complexity in evaluations should be outweighed by the increased opportunity for the State to arrive at best-value choices.

Recommendation 6:

The Governor and the Legislature should direct the Office of Information Technology to ensure that Requests for Proposals match the scope and intent of the Feasibility Study Reports.

dding another layer of oversight may lengthen an already long procurement process; however, it is critical that the specifications and evaluation criteria in RFPs carry to a logical conclusion the analysis and review accomplished in the Feasibility Study Report. Since the Office of Information Technology is responsible for the thoroughness and accuracy of the Feasibility Study Report, it makes sense to extend their mandate to following through with the RFP.

Recommendation 7:

The Governor and the Legislature should direct the Department of General Services to make increased resources available to those who write specifications for procurements.

hose who write RFPs and specifications should have avenues for obtaining technical assistance or should be provided with adequate training and education to deal knowledgeably with information technology procurements. These may include courses provided by national procurement associations and workshops conducted by the Department's own in-house experts.

Finding 4:

Some state policies and laws impede efficient and effective procurements, in some cases driving up costs, limiting purchasing choices and discouraging broad vendor participation.

hile the broad philosophical underpinnings of the State's procurement system identified in the first three findings have a dramatic, long-term effect on what the State purchases, other less wideranging policies and laws have a day-to-day impact on the value the State receives for its expenditures. include rigid standards imposed on departments buying purchase equipment, disincentives for the reconditioned equipment, limited accessibility to the rules governing procurements, and the lack of standardized requirements for interactions between vendors and state departments. The result of policies and laws in these areas is to constrain officials from making the best purchasing decisions and to discourage wider vendor participation in state procurements.

Rigid purchasing standards: When a department wants to buy a piece of equipment such as a copier, fax or postage machine, its choices are constrained by a "standards matrix" that relates volume of anticipated use with level of machine sophistication. For instance, if a department handles fewer than 120,000 pieces of mail a month, it is limited to a manual mail processing machine. If it makes 10,000 copies a month, it is qualified to buy a copying machine with some features -- but a much higher level of use is required to justify buying a faster copier with more features.

Mandatory standards box in department choices on equipment

he mandatory standards matrix takes away the ability of the department's manager to determine the best and highest use of department funds, substituting instead a Department of General Services' determination of what is best, regardless of the purchasing department's unique needs. Problems arise when the matrix keeps a department from making the most efficient choice.

Vendors and state department officials identified the following problems with the standards matrix:

- * In many cases, the standards matrix is out of date and makes little sense. A vendor, who spoke to the Commission confidentially, said that in the case of one type of machinery the lowest level machine, which the standards matrix forces most departments to buy, is actually more expensive than the next model up in ranking.
- * In other instances, the matrix fails to take into account the value of reducing personnel labor and, therefore, costs. The same vendor told the Commission that the model of machine two rankings up from the bottom level costs only \$600 more but provides a doubled life expectancy and vastly increased efficiency. The savings in staff time and resources would quickly offset the \$600 increased cost, he said.
- The matrix is not sensitive to the fluctuation in demands that a department may place on The matrix, based on monthly machinery. averages, allows a department to have a machine that is rated to hold up well under the use demand spread out over a month -- but the machine may not be able to stand the strain of the same demand over a few days. For instance, a department with a fluctuating workload may make 10 copies a day throughout most of the month but makes 10,000 copies over a two-day period in the middle of each month. During those three days, the copier is actually used at a monthly rate of about 110,000 copies (based on 22 working days in a month). A department facing such a situation is likely to end up with an unsuitable machine.

It is clear that the intent of the matrix is to establish an outside source of control of choices and provide a check and balance against departments buying "Cadillac" equipment that is not needed. However, one of the functions of a manager is to make the best budget expenditure choices, weighing the higher cost of more sophisticated equipment against the increased productivity and efficiency of operation. Constraint is already imposed by finite budgets: Money spent on one piece of equipment is money that is not available for other departmental needs. The department's manager is in the best position to assess how limited resources should be spent.

Recommendation 8:

The Governor and the Legislature should direct the Department of General Services to maintain equipment standards matrices only as an advisory guideline for departments.

epartments should be free to determine what equipment best meets their needs based on individual department differences and priorities rather than having to follow mandatory standards that may be inappropriate. The Department of General Services, however, should continue to establish optimal standards so that departments will have an independent, non-vendor-based source of information that can be used in the decision-making process.

Reconditioned equipment: There is a thriving market in used, reconditioned equipment that typically carries goodas-new warranties and price tags with about half the cost of new equipment. But both vendors and state department officials complained to the Commission that the State does not allow the purchase of used equipment.

Extra hurdle discourages the purchase of reconditioned items

pon investigation, the Commission learned that the State's procedures actually do allow the purchase of reconditioned equipment. But by requiring special justification from the interested department and prior approval by the Department of General Services, the State has set up a procedural disincentive that most departments never surmount.

Recommendation 9:

The Governor and the Legislature should direct a modification of procurement procedures that would allow departments to purchase reconditioned equipment at their own discretion.

ust as managers should be relied upon to determine what equipment best meets their department's needs, they should also be able to determine whether reconditioned equipment is a worthwhile investment in terms of costs, risks and benefits.

Accessibility of procurement process: The procurement process is governed by state laws, regulations and policies. The State falls short of having an easily managed and easily understood system because of disorganization of statutes, lack of standardization and a failure to disseminate information widely.

The statutes that pertain to procurement are largely found in the California Public Contract Code, although other pertinent sections are in the Government Code, the Public Resources Code and the California Military & Veterans Code. Statutes are not well-organized within the Public Contract Code. For instance:

- * Statutes within the Public Contract Code that deal with recycling include Sections 10233, 10405 and a series of sections beginning with Section 12150. Interspersed are sections dealing with non-recycling issues, such as conflict of interest and competitive bidding procedures.
- * Statutes beginning with Section 12100 that describe the separate process for acquiring electronic data processing equipment describe a major category of procurements. Yet the sections come after statutes on approval of contracts (10295), conflict of interest (10410), remedies and penalties (10420), and other matters, all of which are applicable to the procurements described in Section 12100.

Statutes on related matters also are scattered across several different codes. For instance:

- * Statutes concerning minority, women and disabled veteran business enterprises are located in the Public Contract Code (participation goals), the Government Code (certification) and the Military and Veterans Code (disabled veterans enterprises).
- * Recycling statutes are found in the Public Contract Code, the Government Code and the Public Resources Code.

Public understanding of procurement process hindered by statutes, SAM policies

n addition to statutory disorganization, the State also makes it difficult for vendors to fully understand the procurement system by placing many of the policies and procedures in the State Administrative Manual rather than in regulation. Unlike regulations, the policies in the manual are adopted without public input and without review by the Office of Administrative Law, the body that

ensures regulations conform to the intent of laws. The manual is not widely disseminated to the public or vendor community.

Finally, there is a lack of standardization among the processes affecting different types of procurements. For instance, the State Board of Control hears bid award protests (as will be discussed in the next chapter). But it does so only for the purchase of goods, commodities and information technology. Protests of service contracts are handled by the Department of General Services and construction contract disputes go to a separate hearing board. In another example (also to be discussed in a later chapter), enactment of the minority, women and disabled veteran program is the responsibility of each individual department and therefore is not handled uniformly across all state programs.

The failure of the State to make "the rules of the game" easily accessible and understandable to all has an affect on both departments and vendors. Departments struggle with a system that appears full of arcane twists and turns, and vendors are discouraged from participating in a system that is shrouded in mystery.

Recommendation 10: The Governor and the Legislature should enact comprehensive legislation to reorganize, simplify and streamline statutes relating to procurement.

n addition to bringing a comprehensible structure to the statutes, the Governor and the Legislature should direct the Department of General Services, in conjunction with a committee of vendors, departments and other procurement parties, to review and refine policies and procedures contained in the State Administrative Manual.

Lack of standardized formats: Some vendors are disinclined to contract with the State, complaining of excessively burdensome requirements that vary from department to department. Others cope with the varying requirements but maintain that it adds to costs and inefficiency. The lack of standardization, then, may limit the pool of competitors for contracts and result in higher expenditures for the State.

Each department has its own format for invoicing and reimbursement

ne example brought to the attention of the Commission by the University of California, which last year performed more than \$66 million in contracts with state agencies, is the invoicing requirement. The State Administrative Manual (Section 1248) sets out seven items that must be detailed in each invoice to the State: personal service costs, fringe benefit costs, operating expenses, equipment costs, travel expenses, overhead and other. But each department has its own requirements for the format of the invoice and the way reimbursement is listed. For instance, the university faces nine different definitions of what constitutes allowable overhead that may be charged to the State. A University of California official told the Commission:

> From our broad experience contracting with so many state agencies, we have found that in general the State's contracting procedures are excessively burdensome and unnecessarily duplicative. They require extensive administrative services, which cost both the University and the state agency unnecessary staff time.

> Specifically, with regard to invoicing requirements, every State department puts different terms and conditions in its contracts and requires а separate department invoice and invoicing procedures.... Most state agencies will not accept the University's invoice form. They each have their own individual agency form which they require to be used even if the University's invoice provides the exact same information.55

As a result, the University must create separate invoicing formats and transfer the information from its computerized system to the forms by hand.

Other vendors also complain that the rules and procedures of contracting appear, from an outsider's perspective, to vary from department to department and information is sometimes difficult to obtain. The result is confusion and errors that drive up administrative overhead, which in turn is reflected in prices the State pays.

Recommendation 11: In consultation with vendors, state departments and other procurement interests, the Department of General Services should review contracting and invoicing procedures and create standardized formats to be used by all departments.

hile each department may believe it has individual needs that require different procedures, the State should attempt to reach some level of uniformity that will lessen administrative burdens and costs, both for the State and for the vendors.

The Protest Process

- * The State's protest process is fragmented and lacks the formality needed to give its decisions weight.
- * The process is perceived to be unfair and ineffective, undermining its credibility.

Recommendations:

- * Centralize and provide uniformity to the bid protest process.
- * Create an alternative binding arbitration process.
- * Increase the perceived fairness of the system by requiring an open, documented decision making process.

The Protest Process

competitive bidding system is somewhat self-policing when it comes to weeding out corruption, bias and bribery if the bid award process is open and a protest mechanism exists. The openness ensures that losing bidders may examine competing bids and decisions thoroughly. Having a forum to review the bid award process and make findings of fact provides the opportunity for complaints to be lodged at the first sign of favoritism, improper evaluation or misapplied standards.

In theory, the protest process is a check and balance system that discourages procurement officials from taking short cuts or acting improperly and encourages vendors to compete for state contracts by giving the procurement system credibility and an aura of fairness. California has a protest mechanism for those very reasons. But in practice, the protest process has fallen short of theoretical ideals.

Finding 5:

The State's contract award protest process is fragmented, is informal to a point that credibility is undermined, and is hampered by the perception — if not the reality — of being a kangaroo court that is unfair and/or ineffective.

alifornia's procurement protest process is spread among a variety of bodies. Where a bidder goes to complain about a procurement process or decision is dependent on the type of contract involved and the stage of the process being protested. The protest process in general has few of the procedural guidelines and structured policies that usually are essential for a system to have predictability and credibility. The "final" decisions of the protest system often involve no resolution of the problem and are tainted by an appearance of conflict of interest -- all of which result in a perception that the State's protest mechanism is unfair and/or ineffective.

The question of who handles protests is answered invariably with another question: What kind of contract is involved? In general, protests for the following types of contracts are under the jurisdiction of the bodies listed in the table below:

DIVISION OF PROTEST RESPONSIBILITY

TYPE OF CONTRACT	PROTEST AUTHORITY
Commodities, Equipment Materials	State Board of Control
Services, Consultants	Department of General Services
Construction	Construction Arbitration Program

In addition, statutes relating to electronic data processing and telecommunications equipment purchases specifically provide an avenue for vendors to protest about specifications. Called initial protests, these are reviewed by the director of the Department of General Services (who currently has delegated that duty to the deputy director in charge of the Office of Procurement), whose decision is final.

While a vendor seeking to gain an overall familiarity with state procurement practices might have difficulty sorting out responsibilities, the vendors interested in a particular contract should have no such trouble. Each Request for Proposals is required to spell out the mechanism by which participants can protest, including specifying the timeline involved.

In keeping with its decision to focus on major electronic data processing and telecommunications purchases, the Commission confined its examination of the protest process to the State Board of Control. (The Commission, however, did note that many vendors complained that the process for protesting decisions on service and consultant contracts -- lodged inside the same department that handles one-quarter of the State's procurements -- is perceived as an inaccessible, rubberstamp function that delivers little satisfaction.) The following description of the protest process comes from a review of statutes, regulations and the Board's Bid Protest Guidelines, as well as interviews with Board and procurement officials.

Protests must be filed within 24 hours and supported with details in 10 days

rotests come to the State Board of Control through the Office of Procurement. In general, once the procuring agency has announced an intention to award the contract to a specific bidder, other bidders have 24 hours to alert the agency and the Office of Procurement about any protests. The Board is then notified and the bid award is placed on hold until the protest is either withdrawn or decided by the Board. Within 10 days, the complainant must file with the Board detailed documentation supporting the protest.

During the same 10 days, the Office of Procurement reviews the preliminary protest and may take one of several actions, including cancelling the bid process, advising the procuring agency to modify the intent to award, or preparing an analysis to demonstrate to the Board of Control that the proper award has been chosen.

The Board of Control, based on its staff review, the protest documentation and Office of Procurement analysis, may determine that the protest lacks merit or is frivolous on its face and reject the protest without holding a hearing. Or the Board may decide to hold a hearing itself or delegate that function to a hearing officer. Under the board's current procedures, hearings are conducted under contract by a retired deputy state controller who serves as an administrative hearing officer.

The hearing officer may conduct hearings with witnesses and cross-examinations, or an examination of facts may be limited to comparing submitted written testimony. Parties to the process may include the complainant, the intended awardee, the purchasing agency, the Office of Procurement, and other bidders whose standing may be affected by the outcome.

In general, the complainant needs to prove two things:

- * That the complainant's bid should have been selected because it was compliant with and fully responsive to the RFP and was the low bid (or highest point score in a non-price-based evaluation).
- * That an error was made in selecting the intended awardee because the bid was either non-compliant, non-responsive or not the actual low bid (or highest point score).

If throwing out the intended awardee would not result in the complainant being the selected bidder, then the complainant has no standing to bring a protest.

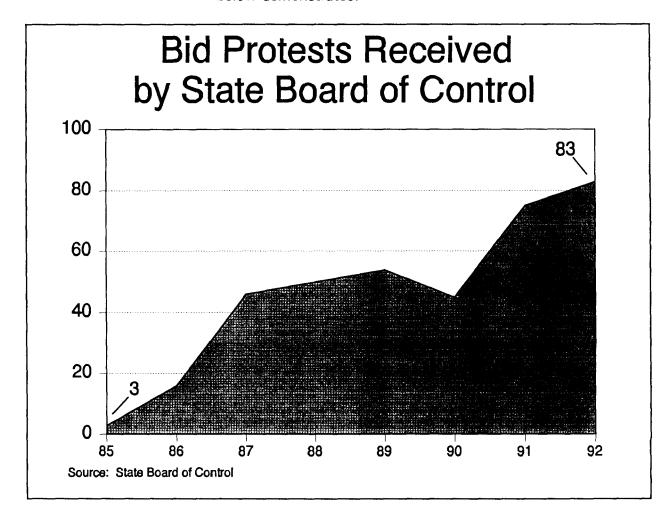
The Board of Control believes it does not have the authority to order a remedy

he hearing officer forwards a written opinion to the Board, which reviews and typically adopts the hearing officer's decision. Decisions come in the form of upholding or rejecting the protest, but not as an order to remedy the protest by taking a specific action. Board officials have told the Commission they believe there is no law that gives them the jurisdiction to order a remedy when a protest has been found to be valid.

If a protest is rejected, the complainant may pursue the matter in court, typically beginning with superior court, followed by the state appellate court and the state Supreme Court.

If a protest is upheld, the decision is forwarded to the Office of Procurement. The office, working in conjunction with the procuring department, may adjust the bid award to conform with the protest decision. Or they may decide to cancel the procurement and begin the bid process again.

The number of protests handled by the Board have grown dramatically in the past few years, as the chart on below demonstrates:



oard officials have indicated that the surge in cases in the past two fiscal years, as shown in the chart above, resulted from the newly instituted minority, women and disabled veteran program (which will be discussed in the next chapter). As familiarity with the program grows, the Board anticipates these types of protests tapering off. However, even prior to the new program and the protests it has sparked, the number of complaints had increased greatly, rising from three in 1984-85 to numbers in the 40s and 50s from mid-1986 through mid-1990. For the first six months of fiscal 1992-93, about 40 protests were filed, indicating the pace has not slackened.

State officials and vendors have different perspectives on why the growth in protests has occurred. Among the reasons cited by various state officials:

- * The business climate of increasing competitiveness. Company officials who have lost out on a bid that cost their company a substantial investment in time and resources may need to justify the loss to their superiors by blaming state errors and mis-evaluations.
- * Failure to understand the specifications or the evaluation criteria. Bidders may incorrectly believe they have complied with an RFP or may not understand the reason their bid was rejected or passed over.
- * The advantages of delaying an award. Once the bid has been awarded, the other vendors have lost. But if the award is delayed, outside factors may arise or a successful protest may cause the State to rebid the contract -- in which case the losing vendor has another opportunity to win.
- * Minimal added cost. Once the company has invested substantial resources in preparing a bid, the added cost of the bid protest process is minor compared to the payoff if a loss can be turned around.
- * A cottage industry of protest specialists. Some officials believe that the presence of lawyers who have made procurement protests their specialty has encouraged increasing numbers of protests.

Some vendors agree with reasons outlined by state officials. In addition, they add some of their own observations:

- * Increasing complexity of procurements. With RFPs growing ever larger and specifications becoming more and more detailed, there are more chances for a bid to deviate from the required criteria. This increases the opportunities for arguments about whether deviations are material and bids should be rejected or are acceptable and therefore not fatal to the bid.
- * Lack of technical knowledge to evaluate bids adequately. By and large, vendors have a poor opinion of the technical expertise of state

employees who are called upon to draft specifications and evaluate responses for technical capability. As bids become more complex, there is more room for argument over whether what a bidder has proposed can actually perform and meet State needs.

* Increased frustration as the expense and time involved in procurements grow. Bidders feel they are being asked to jump through more and more hoops in preparing responses to RFPs, but their perception is that in many cases the State already knows who it wants to do business with and stacks the deck against all other companies during the evaluation process. A sense of unfairness prompts many protests, according to vendors.

Whatever the reason or combination of reasons for protest growth, the numbers have placed an increasing burden on the State Board of Control. The Board estimates it now spends about \$200,000 on handling protests, an amount it has kept under control only by streamlining processes and economizing on the methods for holding hearings.

Vendors say increasing protests prove system is broken; state officials disagree

n addition to disagreeing on the causes for increased protests, vendors and state officials also differ on how significant the number of protests are. Vendors believe protests are a sign of a broken procurement system, a lack of trust on the part of bidders that they have been treated fairly and an indication that companies are becoming less willing to deal with the State. State officials, however, point out that in the last fiscal year there were only 83 protests out of some 50,000 transactions that would fall within the Board of Control's jurisdiction. They say there were so few protests because the state's oversight mechanisms are fair and responsive to legitimate complaints. Many protests never become official because the Department of General Services deals with them administratively, adjusting errors and redressing grievances without waiting for the formal process to identify obvious problems with procurements.

The State Board of Control supplied the Commission with statistics on the resolution of protests filed in 1991-92:

State Board of Control Protest Resolutions

RESOLUTION AS OF 9/2/92	NUMBER
Decided by the Board following full hearing:	
Denied	28
Upheld	4
Dismissed by the Board without a hearing	11
Resolved by administrative action:	
No jurisdiction to accept protest	2
Prematurely filed (prior to award decision)	2
Untimely filed (after contract award)	4
Withdrawn by protestant	11
Bid cancelled by Office of Procurement	5
Bid award decision changed by Office of Procurement	4
Failure to timely file a detailed statement	6
Pending resolution	6
TOTAL	83

Source: State Board of Control

s the chart indicates, only four protests out of 83 were upheld, or almost 5 percent of the protests. Some critics of the Board of Control, comparing the Board's annual rate of between 3 and 5 percent of protests upheld to federal statistics that show a much higher protest success rate, have charged that the dismal success rate is a sign that the protest system is biased toward protecting state procurement decisions and is incapable of rendering fair and impartial judgments.

The Commission noted that federal protest statistics on results are significantly different than the State's results. The General Services Administration Board of Contract Appeals resolved 630 contract disputes and electronic data processing protests in 1992 (626 cases were filed during the year). Of the cases resolved, 146 or 23.3 percent were granted.⁵⁶

An analysis of General Accounting Office actions on bid protests shows that that federal agency receives about 2,500 protests a year, decides about 800 cases on their merits and sustains the protests in about 100 cases, for an annual average of between 10 and 15 percent. The General Accounting Office, however, also tracks what it has designated as the "Protester Effectiveness Rate." This rate includes not only the cases sustained but also the cases where the agency took corrective action and either the protest was withdrawn or dismissed. Based on that definition, the agency claims an annual Protester Effectiveness Rate of about 25 percent.⁵⁷

Borrowing the General Accounting Office's reasoning and applying it to the State Board of Control statistics, one can add the number of bid award decisions changed (four) and bids cancelled (five) to the number of cases upheld (four, for a total of 13) to arrive at a Protester Effectiveness Rate of almost 16 percent. While such a statistic is interesting, the Commission is not convinced that there is any "magic" number of successful protests that would indicate a well-functioning protest system, nor is it clear that the federal statistics are relevant to the State experience in terms of proving that the State's system is lacking.

Four factors contribute to level of unhappiness with protest process f statistics are an unsatisfying way of judging the effectiveness of the protest process, then a more fruitful method may be to assess the level of dissatisfaction with the process by participants and trace the contributing factors. Complaints carried to the Commission in general fell into four categories:

Fragmented protest process: As already noted, different types of contracts are protested to different forums. Despite the requirement that RFPs detail the protest process for each individual procurement, vendors complained that they sometimes filed protests in the wrong place, learning of their error only after protest deadlines had passed.

Board of Control conflict of interest: Many question whether the State Board of Control is the logical venue to hear protest complaints based on its other duties and its membership. The Board chiefly exists to address tort claims against the State and the victims of crime program, with bid protests making up less than one-quarter of its workload. Its membership consists of a representative of the State Controller's Office, the director of the Department of General Services and a public member appointed by the Governor -- none required to have any particular expertise in procurement or contracting law.

The involvement of the director of General Services on the State Board of Control has been the focus of much criticism for years. The Department of General by law, forms policies to carry out procurements and also is in charge of implementing and overseeing the implementation of those policies. Adding to that the director's role as one-third of the vote on the body that reviews procurement protests gives the Department a hand -- and some charge a heavy hand -- in how procurements function from beginning to end with little check or balance. In 1982, when a lawsuit known as National Coach Corp. v State Board of Control raised the issue of a director sitting in judgment on his own department's actions, the court ruled that "a government agency may conduct both an initial decision and a subsequent adjudicative review."59

Despite the court-conferred legitimacy of the Board's membership, the perception persists that as long as the director of the Department of General Services is involved, there will be a lack of independent, bias-free review of procurement decisions.

A sense of futility: Vendors also share a common perception that protests are futile. This stems not so much from the low percentage of success rate as from the Board's insistence that it does not have the authority to order a remedy. Therefore, even when a protest is successful, the complainant neither automatically nor in most cases ends up with the award. A common response to a protest that has been upheld is for the State to void the entire bid process and rebid the contract. One critic of the system testified to an Assembly committee:

The appearance of unfairness in the protest process is reinforced by the Office of Procurement, which rejects bids and then rebids when a protestant has been successful in demonstrating that it should have received the award. This occurs even when an existing bid has been found to be fully responsive and offers significant savings to the State, in some cases millions of dollars. Rebids always undermine the integrity of the bidding system and entail added cost and delays to the user agencies. The State is not required to justify the basis for rebidding and does not do so except in the most summary and conclusory terms. obvious, if unintended, message

protestants is that the State will deprive the protestant of contracts if it pursues its rights and remedies.⁶⁰

In addition, many vendors have found the "initial protest" process unsatisfactory. Before the deadline for bid submittals, a company may question the fairness or appropriateness of specifications contained in an RFP. Called an initial protest, statutes provide that these matters will be decided by the director (or his designee) of the Department of General Services. Since the Department already provides the oversight for drafting specifications, vendors believe the only fair hearing they will receive is if the disputes are resolved by an outside entity. The Board of Control, however, refuses to hear specifications protests even when they are raised after bids are submitted, considering specifications outside of its jurisdiction. The practical effect is that a potential bidder who feels specifications have been drafted in such a way as to bar him from participating has no recourse except to go to court once the Department has upheld the specifications.

An informal, non-rigorous process. Staff at the Board of Control strive to keep the protest system accessible to all parties, guiding unsophisticated protestants through the system. The informality of the system, which allows protests without legal assistance, keeps costs low. However, the informality also gives rise to some problems. Because formal rules of evidence are not used and opinions are not "published" -- and therefore are not precedent-setting -- there is little predictability about decisions. Some critics of the system believe a more formal decision-making process, with explicit criteria, would allow bidders to be more successful in using the protest system and/or submitting bids that are fully A more formal and predictable responsive to RFPs. system might also encourage court review of decisions to stick to questions of due process rather than fact-finding.

Many participants in the protest system believe the Board's current use of a hearing officer to conduct hearings -- rather than the Board itself or the Office of Administrative Hearings conducting the hearings -- is a great improvement, allowing the development of expertise and promoting consistency of decisions. However, the mechanism was put in place by an administrative decision that could be changed without notice or disappear once the individual involved is no longer available.

Critics of the informality of the protest process also cite the Board's refusal to compel state agencies to disclose information and provide testimony sought by the protestant.

Also in this category is the experience of vendors who were denied access to procurement decision records needed to prepare a protest. Although by routine policy the Office of Procurement is supposed to make records available, there is no such specific, detailed requirement in law other than the Open Public Records Act. The 10day timeline allowed to respond to a public records request would not allow a company to receive information in time to file the detailed protest within the Board of Controls' 10-day requirement. One vendor was told he would have to sue to get the papers he was requesting; he was not later able to add the material to his protest because it was past the deadline.61 Another wanted to challenge the good-faith effort made by all bidders on a contract but could only obtain the good-faith documentation from the low, selected bidder. Since the challenger would not have been the next lowest bidder if the selected company was disqualified, the challenger had no standing to protest unless he could argue that other, intervening bidders should be disqualified as well. He could not do this in the detail required by the Board of Control without access to the records. The protest was denied.62

Credibility of protest process is undermined by perceptions of bias, ineffectiveness

of sources and often were repeated by different vendors who had experienced similar problems. No vendor questioned by the Commission expressed satisfaction with the protest process and many held a firm view that the system is biased, incapable of operating effectively to resolve bidder grievances, and a mere kangaroo court acting as a rubber stamp for Department of General Services' actions. Whether these perceptions have any basis in reality, they do serve to undermine the credibility of the entire procurement system by tainting it with an aura of unfairness.

Recommendation 12: The Governor and the Legislature should enact legislation to centralize and provide uniformity to the bid protest process, as well as to upgrade the technical expertise of those involved in the process.

ome procurement experts have advocated the creation of a Public Contracts Dispute Resolution Board, a forum that would adjudicate all types of contract disputes and that would be funded by assessing the participants. This proposal has a much broader scope and larger potential impact on state activities than the narrow issue of bid award protests examined by the Commission. The Commission, therefore, cannot endorse the creation of a new and separate bureaucracy.

The more limited goal of standardizing bid award protests embraced by the Commission can be achieved easily and less dramatically by shifting the protests concerning consultants and services contracts from the Department of General Services to the State Board of Control (in conjunction with other reforms to make the Board's operations more effective and credible). All levels of protests, including cases involving the drafting of specifications, would be included in the Board's jurisdiction and funding would be shifted from the budget areas now supporting those functions.

In addition, the legislation could broaden the expertise of the State Board of Control by adding appointed members with experience in procurement issues, contracting law and/or electronic data processing technology. This would add to the credibility of the Board in two ways: improving the technological and legal know-how of those making decisions and mitigating the perception that the Department of General Services, through the director's membership on the board, dominates the protest process.

Since the board already has a gubernatorial appointee, one possibility for broadening the membership would be to add two public members with such experience, one to be appointed by the Senate Rules Committee and one to be appointed by the Assembly Speaker. A possible criticism of this option is that the Board of Control's responsibilities include activities beyond hearing bid protests. However, broadening the representation on the board should not be detrimental to the board's decision-making process on other matters.

Recommendation 13: The Governor and the Legislature should direct the State Board of Control to institute formalized hearing procedures, record precedent-setting decisions, order remedies for bid award errors when appropriate and in other ways standardize the operation of the

bid protest process.

hile the bid protest process should remain streamlined, inexpensive and accessible to unsophisticated bidders, a more rigorous approach to procedures would assist vendors in understanding and using the system. More predictable results and the shared information in published decisions may serve to reduce future protests by giving vendors guidance in how to comply with RFP requirements. In addition, increasing the authority of the State Board of Control to complete the bid protest process with an order for a remedy may improve the credibility of the system.

Recommendation 14: The Governor and the Legislature should enact legislation to create an independent, binding arbitration process for those protestors who are willing to pay the costs of an alternative process.

y offering speedy resolution and the ability to select arbitrators with specialized technical knowledge, the binding arbitration process would offer a practical choice for bidders with protests on complex contracts. The legislation could include a mechanism for allowing the parties to select a mutually agreeable arbitrator. This alternative, in addition to meeting the needs of vendors, would relieve additional work load pressure from the State Board of Control by diverting at least some protests.

Recommendation 15: The Governor and the Legislature should enact legislation that would require the release of all relevant records to bid participants within a time frame sufficient to allow the filing of a detailed protest.

law that may not yield information until after the bid protest deadlines have passed. Relevant records should include all information, documents and memoranda regarding bid specifications and evaluations.

Recommendation 16: The Governor and the Legislature should enact legislation to require documentation of reasons when all bids are rejected and a project is put out for rebid.

hile the State needs the flexibility to change direction because of new information or altered conditions (such as costs far exceeding estimates or changing needs), the credibility of the procurement system requires justification when bids are set aside. Only by documenting the reasons for such an action may the State avoid the appearance of jettisoning a procurement solely because the "right" bidder did not win the contract. Similar laws requiring such explanations exist in the American Bar Association's model procurement act, several large states and the federal government.

Cultural Diversity

- * The MBE/WBE/DVBE program adds cost and complexity to the procurement process without meeting expectations and goals.
- * The key problems are fragmented authority, the good-faith effort process, certification and enforcement.

Recommendations:

- Revamp the existing program through one of three options.
- * Eliminate or overhaul the good-faith effort process.
- * Restructure certification.
- Pursue aggressive enforcement.

Cultural Diversity

n 1989, the State -- reflecting the growing cultural diversity of California's population -- created a program to broaden the pool of businesses from which the State buys goods, services and construction activities. Focusing on minority business enterprises, women business enterprises and (later) disabled veteran business enterprises, the program is known by the acronym MBE/WBE/DVBE. Under the program, state contracts have participation goals of 15 percent for minorities, 5 percent for women and 3 percent for disabled veterans. State departments have the responsibility of ensuring that contractors meet these goals through subcontracting or that the contractors document that they have made a good-faith effort to meet the goals.

Similar programs all are meant to reach a wider range of vendors The federal government has requirements for the use of Disadvantaged Business Enterprises (DBEs), the United States Commission on Minority Business Development is focusing on Historically Underutilized Businesses (HUBs), and many states, counties and cities have chosen various methods of increasing contracting with Emerging Enterprises (EEs). Even within state government itself, various programs predated MBE/WBE/DVBE, including contracting requirements at Caltrans, the Department of Corrections and publicly regulated utilities. While the variety of programs differ in the mechanisms that are used and the degree to which

participation is assured, all have the intent of breaking the mold of past contracting and procurement practices to ensure that governments henceforth reach out to and spend public dollars with businesses owned and operated by all sectors of society.

There is little dispute that MBE/WBE/DVBEs have operated at a disadvantage in the past. In 1972, the federal Civil Rights Commission reported that only one-sixth of 1 percent of total public procurement dollars were spent on minority-owned firms. Although no statistical study has been done for the State, studies of regions within its borders -- such as San Francisco and Sacramento -- consistently have turned up patterns of a failure to use firms owned by minorities and women despite the presence and availability of those firms.

The 1987 Department of Commerce Census Bureau report showed more than 884,000 businesses in California owned by minorities and women. The California program was created with the announced intention of reaching these businesses.

The mechanism selected by the State was influenced by political realities and legal constraints. The program is neither a set-aside that simply delivers a percentage of all procurement dollars directly to MBE/WBE/DVBEs, nor is it a preference program that gives an edge to bidders who either are or use MBE/WBE/DVBEs. Instead, it is an expression of desired intent coupled with educational outreach that many would like to see perform like a set-aside or preference program. This, however, does not occur because there is neither a carrot nor a stick to make the attainment of the 15-5-3 percent goal a reality; instead there is an escape hatch that actually is a hindrance to the success of the program.

MBE/WBE/DVBE
program raises
expectations but
does not fulfill them

any of the people connected with the program -including those who worked to create it and
those who would benefit from it -- have
expressed expectations about results that would be more
likely to be fulfilled if it were a set-aside or preference
program. Some examples:

* A Filipino businessman who has bid numerous times under the program but has never received a contract complains that a single contract interview cost him \$6,000 and two weeks of preparation. "I still haven't gotten a contract. I got close to one. I found out getting to the interview stage is a high cost to me." 63

- * Writing to the Commission about the experiences of disabled veterans with the program, John Lopez of the Association for Service Disabled Veterans said: "A sample inquiry of 287 [disabled veterans] who are starting or expanding a small business in California reports that over 150 had negative and discouraging experiences when attempting to solicit state and public utility contracts."
- * A minority vendor complains that large prime contractors prefer to buy from other large companies where they can get discount prices. "If the contractor can purchase products lower than we can, we don't stand a chance of winning any bid at any time. I thought that the whole intent of this law was to help small and minority businesses find a way to work together on large bids so that everyone wins. Apparently that is not the case." 64
- * Another minority vendor sees little value in the program, writing to state officials to complain that they are not making it work. "[Our company] is not looking for any handouts. What we want from you is an intervention. As we all know, minority contractors are not getting a fair share. Why? What are all of these departments for if they don't come up with solutions? If these people are not going to do their jobs, get rid of them or the entire program. It serves us minorities no purpose. The MBE/WBE/DVBE program provides you people with a good living, not us African American contractors."

As one MBE/WBE/DVBE advocate and vendor summed it up, the program has raised expectations that are not and cannot be met because of the way it is run. The result, so far, has been widespread disappointment leavened by only a few bright spots of success.

The Commission approached its examination of the MBE/WBE/DVBE program with a clear scope and mission. The Commission begins with the presumption that state policy makers have already judged that such a program is necessary and socially beneficial. As a result, the Commission focused on the question of how to make the program effective. To the Commission, it seems counterproductive, at best, to raise the expectations of MBE/WBE/DVBEs with optimistic goals only to dash their hopes with an under-administered, overly burdensome program that is not designed to deliver.

Finding 6:

The Minority Business Enterprise/ Women Business Enterprise/Disabled Veteran Business Enterprise program is failing to meet the goals set by law.

s the MBE/WBE/DVBE program enters its fifth year, almost all state departments are failing to reach the 15-5-3 percent goals for contracts. The program's administration is fragmented and its provisions are applied unevenly; in some cases, the law has simply been ignored while in others advantage has been taken of loopholes. The program's good-faith effort and certification components and the lack of enforcement mechanisms all impose undue burdens on state departments, vendors and MBE/WBE/DVBEs, adding to state and private sector costs without producing the desired results. Although recent revisions promise some performance improvement, other sorely needed reforms pose a dilemma by threatening the program's viability.

In 1991-92, 4.23 percent of all state contracts went to minorities and 2.13 percent to women. (No statistics were available for disabled veteran business enterprises, the newer portion of the program.) The chart below shows a breakdown by state agency:

DISTRIBUTION OF STATE CONTRACTS TO MINORITIES, WOMEN IN 1991-92

AGENCY	.		ITIES {%}	WOMEN (Millions) (%)	
1. State and Consumer Services	\$1,440.2	\$111.8	7.8%	\$53.2	3.7%
2. Health and Welfare	141.8	16.7	11.8	4.9	3.4
3. California State University	356.5	13.6	3.8	9.0	2.5
4. Business Trans. & Housing	1,646.2	11.5	.7	3.9	.2
5. Resources	150.1	2.8	1.9	2.9	1.9
6. Other	67.2	3.3	4.9	4.2	6.2
7. Youth and Adult Correction	107.6	3.2	3.0	4.6	4.2
8. Environmental Affairs	12.2	.8	6.4	.9	6.9
9. CA Environmental Protection	27.4	3.1	11.4	.6	2.3
TOTAL	\$3,949.2	\$166.9	4.2%	\$84.1	2.1%

Source: Office of Small and Minority Business

s the table on the previous page shows, the agency with the most amount of contracting dollars -- the Business, Transportation and Housing Agency -- has the most dismal results, with only .7 percent of the contracts going to minorities and .2 percent going to women. The agency with the best results for minorities (Health and Welfare at 11.8 percent) and the agency with the best results for women (Environmental Affairs at 6.9 percent) were among the smaller spenders on total contracts.

Within each agency, some departments are more successful with the program than others. For instance, the Mental Health Department contracts 14 percent with minorities and 3.52 percent with women on a total of \$105 million in purchases. Based on \$17 million in contracts, the Department of Motor Vehicles contracts 19.7 percent with minorities and 10.4 percent with women. At the other end of the spectrum, the Department of Justice contracts with 2.1 percent minorities and 2.34 percent women on \$21 million in purchases. The Teale Data Center, spending a total of \$22.6 million, contracts with 1.3 percent minorities and .1 percent women. And the Department of Personnel Administration contracts .11 percent with minorities and .46 percent with women on total expenditures of \$117.7 million.

The statistics can be regarded with some degree of skepticism, however. The Office of Small and Minority Business, which compiles the figures once a year, warns that the statistics are gathered from numerous source documents and may be inaccurate because of differing reporting methods.

The disparity that may result shows up very clearly with two departments: Caltrans and Corrections. Both departments testified to the Commission that they either met or exceeded the goals for each of the past two years. Yet the Office of Small and Minority Business report shows Corrections contracting with minorities 2.6 percent and women 4 percent on total contracts of \$100.5 billion. Caltrans does not show up as a separate listing, but the areas covered by it under the Business, Transportation and Housing Agency category for the most part show less than 2 percent contracting with minorities and less than 1 percent with women. The difference lies in what dollars are counted. The Office of Small and Minority Business for the most part counts only state dollars, but both Caltrans and Corrections spend a significant amount of federal dollars.

Another area that leads to discrepancies is the failure of some departments to adequately reflect percentages of contracts that are subcontracted to minorities, women and disabled veterans. If the prime contractor does not fall into one of those categories, the department may fail to properly count portions of the contract as going to MBE/WBE/DVBEs.

While the data provided by various departments and the Office of Small and Minority Business needs close scrutiny to arrive at any useful conclusion, it does seem evident that, for the most part, the State is falling well short of the 15 and 5 percent goals.

Lack of centralized authority and accountability leads to uneven results

be directly attributed to the fragmented nature of the program. Rather than placing the Department of General Services in charge of the program or investing the Office of Small and Minority Business with accountability for performance, the MBE/WBE/DVBE law requires each separate department to adopt regulations, enforce the program and report results to the Legislature. The outcome of placing no single entity in charge is clear in an Auditor General's report of the program in late 1991, almost two years after the law's implementation date, which found that some agencies had yet to begin following the law. The report cited the following problems:

- * Some state agencies had not adopted rules and regulations to implement the 1989 law.
- * Some state agencies had not always required successful bidders to document the efforts they had undertaken to include minority and women businesses in contract bids.
- * Some state agencies were not reporting their participation levels as required by law.
- * State agencies did not use consistent methods to prepare the statistical reports.
- * The data included in the reports did not accurately reflect the actual participation levels, in most cases under-reporting participation.
- * Even if the data were accurate, it was unlikely that the agencies would have met the goals. 66

Fragmentation
makes it difficult
for vendors to get
reliable answers

he fragmented authority also has resulted in frustration for vendors, both non-MBE/WBE/DVBEs and MBE/WBE/DVBEs. Because there is no centralized authority, it is difficult for a bidder to determine where to call to get accurate information. The Department of General Services acknowledges the problem:

Literally thousands of employees are involved in the administration of the MBE/WBE/DVBE program. Different agencies have different requirements and do make different interpretations. Try as one might, it would be unrealistic to expect that precisely the same answer would be given to identical callers in identical circumstances in every instance.⁶⁷

Vendors who do business with many different departments quickly learn that each handles the MBE/WBE/DVBE requirements differently, including setting different standards for what will be considered a good-faith effort and what type of sub-contracting can be counted towards contract participation. MBE/WBE/DVBEs who want to know how to become certified or how to learn about contracting opportunities find no single source of information. Sometimes the answer given to a vendor or the treatment of his bid is just plain wrong. One agency that represents vendors told the Commission:

Misunderstanding of the MBE/WBE/DVBE requirements is widespread in state government, as well as in the contractor community. We know of one instance where a non-profit organization's bid, which included documentation of a goodfaith effort, was rejected by the contracting agency in the mistaken belief that when a competing bidder offered to meet the numerical goals, the non-profit's good-faith bid was required by law to be rejected. More importantly, uncertainty as to how to comply, document compliance and avoid General Services' second-guessing increases the delays in what is already an extremely time-consuming process of negotiation and approval of state contracts.68

Another vendor complained that one department allowed a bid to count a proportionate share of the firm's

insurance and bonding costs toward contract participation but most other departments would not. A third vendor, who tried repeatedly to provide fire-fighting equipment to the Department of Forestry and Fire Protection, was told in September 1992, two years after disabled veterans were added to the program: "While your designation as a disabled veteran business enterprise is recognized as a hiring goal by this department, we presently do not have a procedure for this as it pertains to emergency authorization hires." ⁶⁹

Summing it up, another vendor said:

There's a cavalier attitude and the ground rules are always shifting. The State doesn't make it easy. Since the law gives each agency the ability to develop their own parameters, no one knows the rules from agency to agency. The rules are ambiguous, if not unavailable. If you ask them to cite a source, the department doesn't know or can't find it.⁷⁰

Departments find demands of program difficult to cope with

tate departments are no less frustrated. Many believe they have been handed an unworkable program that requires them to meet a goal but gives them no tools to do so. They have been given no added resources to educate vendors or perform outreach to MBE/WBE/DVBEs. Low-price competition laws require that contracts be awarded to someone who has made a good-faith effort and has no MBE/WBE/DVBE participation instead of to someone who has met the goals -- yet the department is judged on its ability to reach the goals.

Non-MBE/WBE/DVBE vendors have their own complaints. Many have found it difficult to create subcontracting opportunities and others had just as much difficulty getting straight answers as the MBE/WBE/DVBEs:

* The University of California, which does about \$66 million worth of business a year with state agencies, often is hired to conduct research studies: When it is the University's facilities and staff that are required to do the work, none of the work would be subcontracted to other entities. So it is impossible to meet the participation goals with subcontracts. However, there is no exemption from these requirements even when the contract has no subcontracting. Purchasing of supplies, materials and equipment on each campus is done

through central purchasing....So it is also impossible to meet the participation goals on any one individual contract with the purchase of supplies, equipment and materials. Although we explain our centralized purchasing requirements and the fact that each campus has adopted the state goals, state agencies and the Department of General Services have refused to accept a campus plan in lieu of meeting the requirements for each individual contract.⁷¹

- Rolm, a company that manufactures, installs and services telephone systems, meets egual opportunity and affirmative action hiring goals. But on a contract by contract basis, there are few opportunities for it to subcontract work out. "A sizable amount of a telecommunications contract is dedicated to service and equipment that can only be handled by in-house expertise." addition, there is a relatively small number of MBE/WBE/DVBEs in the industry, limiting the choices and increasing prices when the company does find a subcontractor.72
- A firm that qualifies as a MBE but that still needs to find WBE/DVBE participation on contracts said it is difficult to maintain quality when one must use outside companies for work that the firm is capable of doing: I cannot stress enough how burdensome, time-consuming, inefficient and expensive it is for a small business which is able to perform a contract with its own work force to have to contract out as much as 23 percent of its contract....It does not promote free competition and fair prices to have to hire someone for a designated percentage of your contract whether you need them or not. Recently, we turned up a certified prospect who, when informed that his qualifications did not meet the needs of the contract, stated that "you don't have to need me. It isn't important what I do; you just have to pay me."⁷³
- * A computer supplier said it is impossible to get definitive rulings on how to apply the program: While both departments were unquestionably committed to program success, neither the Office of Small and Minority Business nor the Department of General Services accepted the role of the highest level of authority for issuing official rulings on questions submitted by the private sector

pertaining to the MBE/WBE/DVBE program. Questions surfaced such as whether Puerto Ricans, Persians or Cubans qualified as MBEs, with neither department willing to respond officially. Throw into the picture differences between the California Department of Transportation MBE/WBE/DVBE certification process, the federal government's certification process, and confusion was inevitable.⁷⁴

Prime vendors, particularly large, worldly corporations that have been working on cultural diversity policies for years, can find the State's program particularly irksome. The companies may exceed the goals in their own budgets by purchasing supplies and contracting for services with MBE/WBE/DVBEs day in and But the State's only concern is about subcontracting opportunities in each specific contract. For the most part, companies are not allowed to count their internal efforts as going toward meeting the State's goals. This limits the advantages that might otherwise be achieved by some MBE/WBE/DVBE industries, such as insurance and bonding concerns and janitorial services who could use their status as a selling point if companies could include them in meeting goals. Legislation has been proposed that would allow companies to submit a "global plan" to the State, showing percentages of dollars going to MBE/WBE/DVBEs on an annual basis and applying that proportionately to state contracts the firm bids on. So far, the legislation has been unsuccessful.

Areas of failure: good-faith effort, certification and enforcement

t is not unexpected that the buyers and entrenched sellers -- the state departments and the non-MBE/WBE/DVBEs -- would be happier if they could continue business as usual; it is always easier to do what is familiar and what has been done before. But the unhappiness expressed by the businesses that the program was intended to assist is a telling piece of evidence that the program is not working. Those involved identified three areas where the program has failed to meet expectations: the good-faith effort, certification and enforcement.

The Good-Faith Effort: The MBE/WBE/DVBE law requires departments to award contracts to the lowest responsible bidder who either meets or makes a good-faith effort to meet the goals of 15, 5 and 3 percent. A good-faith effort is defined by doing and documenting the following:

1. Contacting the procuring department to find out any MBE/WBE/DVBEs that are known to them.

- Contacting other state and federal agencies and local MBE/WBE/DVBE organizations to identify potential subcontractors.
- Advertising in trade and MBE/WBE/DVBE newspapers, unless time limits imposed by the department do not permit such advertising.
- 4. Inviting MBE/WBE/DVBEs to participate by sending solicitation letters.
- Considering any available MBE/WBE/DVBEs for inclusion in the bid.

In theory, the good-faith effort serves two purposes. One is educational outreach, with both vendors and MBE/WBE/DVBEs becoming aware of each other and the potential for doing business together. The other is to allow the State to award a contract when MBE/WBE/DVBEs are not available at all or in insufficient numbers for vendors to find subcontractors.

Some vendors find good-faith effort the easiest way to comply on bids he reality of the good-faith effort option, however, is that in many industries vendors have found it cheaper, safer or just easier to simply go through the motions and provide the documentation for the State. Since there is no preference attached to obtaining the goals and no credit given for partial success, the State frequently ends up awarding contracts to vendors who have not subcontracted at all, bypassing those who have committed to including MBE/WBE/DVBEs.

One computer supplier said the profit margins in his industry are so thin that his company can no longer afford to fulfill the goals because they have lost out on too many bids where the low bidder merely complied with good-faith requirements. Each subcontractor, no matter how efficient, adds its own cost margin and profits to a contract. In addition, he said, firms must go through good-faith effort documentation anyway to protect against having a contract rejected in case one of the subcontracting MBE/WBE/DVBEs is later discovered to be not certified or ineligible. Once a company has to go through the expense and routine of a good-faith effort, there is no incentive to also actually meet the goals. The representative said his company would prefer to see good-faith efforts eliminated so all companies would have to meet the goals and compete on an equal footing.

The good-faith effort does not promote goal attainment, it promotes an 'all or

nothing' approach in which bidders who are willing to take the risk of being subjectively deemed non-responsive can gain advantage by taking the route of good-faith effort as opposed to the more costly route of actual goal attainment.⁷⁵

Good-faith effort is time-consuming and expensive for vendors

ther vendors complain about the cost involved in performing and documenting the good-faith effort. Advertisements are expensive, particularly in specialty newspapers that have been created especially to take advantage of the law. Some vendors send solicitation letters by registered mail as further proof, also an added expense. One vendor said the good-faith effort steps can cost \$1,000 in direct expenditures, not counting staff time and resources. On small contracts, the added cost of complying is a disincentive to bid on state business at all. San Jose State University noted:

Vendors incur significant cost and effort to comply with MBE/WBE/DVBE. This is particularly burdensome to small (often minority or women-owned) companies. Vendor's average time in completing the required paperwork is 14 hours. The advertisements in small business journals and mailings are expensive. Vendors are increasing their bid prices to cover additional costs. Vendors are electing "not to respond" to invitations for bid because the bid requirements are time consuming, expensive, confusing or not applicable to them. ⁷⁶

Good-faith efforts often smother MBE/WBE/DVBEs with paperwork

he prime vendors are not the only ones unhappy about good-faith efforts. MBE/WBE/DVBEs have discovered that not only is good-faith a way for companies to avoid using subcontractors, but it is also a paper-intensive, procedural burden that MBE/WBE/DVBEs have been trapped into. A sampling of comments to the Commission:

- * Willie Carpenter, a contract administrator for construction firms, said he has submitted hundreds of proposals for subcontracting work. "That costs us," he said. "We haven't benefitted tremendously from these programs."
- * John Lopez, writing in the disabled-veteransoriented Challenge News, said: There is no good faith in someone calling your firm and wasting

your time just to document that they called for a good-faith effort. The good-faith effort is supposed to be a means unto an end: a way to find participation so that a prime contractor to the State of California may be a responsive and responsible bidder, not a good-faith flake. ... Common sense dictates that there is something terribly wrong when DVBE firms receive hundreds of telephone calls per month and are being written in many bid proposals but none are receiving any business opportunities.

- * Keith Caldwell with the Alliance of Small, Minority and Women Business Owners said that between April 1, 1991 and June 30, 1992 the State Allocation Board awarded \$337 million in contracts, only 9.49 percent of which went to contractors who met MBE/WBE/DVBE goals -- the rest went to those who provided good-faith efforts. Caldwell wrote: This discrepancy will be the root of dissension in the politics of the future because this high concentration of good-faith effort awards will place the good-faith effort under increasing criticism....In fact, the good-faith effort has been dubbed by some as the Great Fake Effort.
- * John Jezak, owner of an electric firm, said he has many times received a solicitation letter just before a bid deadline when it is clear there is no time to put together a proposal. He said he has also had the experience of being listed by a contractor for a larger proportion of contract than he was later given. And he has been used by contractors as a "pass through," where dollars were paid to him as a minority that he in turn was required to pay to a non-minority subcontractor.
- * Maureen Barile with NEDA, an agency that assists minority firms, said that the paper process "is frustrating for minorities. They bid, and bid, and bid and it turns out to be just part of a good-faith effort. It wastes their time." She said many firms now receive solicitation letters that are even labelled "good-faith effort" at the top.
- * Lynne Choy Uyeda of the Asian Business Association was blunt: Good-faith efforts have created an effective loophole for prime bidders. Filling out the papers with the right names and titles has become the objective of good-faith

efforts. Utilization of qualified MBEs is not their true objective. Prime bidders use and abuse minority firms.

The added, futile paperwork and frustration for minority firms were not the only complaints. Many critics, including Barile and Uyeda, spoke of MBE/WBE/DVBE firms being listed as subcontractors on winning bids but then never receiving any work. Others said firms are listed without ever being notified or submitting a subcontracting bid to the prime bidder. One said a consultant was given a check and a thank you letter but was never asked to do any work.

Barile and others also charged that state departments, in some cases, set the wrong tone when explaining the program to prime vendors. "We feel the State represented itself in an apologetic mode and it was quite evident that state representatives responsible for implementation did not buy into the concept of the legislation." She said some departments actively encouraged vendors to just use the good-faith effort mechanism, a charge echoed by Lopez in the Challenge News.

But many state departments are just as troubled by good-faith efforts as prime vendors and MBE/WBE/DVBEs. Because the state law and the implementing regulations are vague, departments are uncertain about how to judge good-faith efforts -- and their resulting decisions provide an uneven patchwork of approaches across state government.

About half of bid protests involve issues from program

ooner or later, the good-faith effort problems emerge at the State Board of Control when bidders protest contract awards. The Board, which hears about 80 protests a year, says that roughly half last year dealt with MBE/WBE/DVBE issues. Examples of problems provided by the Board include:

- * What type of ad satisfies the advertising requirement? The Board has seen an ad in the personal section of the Los Angeles Times, ads that were so vaguely worded that the type of contract could not be determined, and ads that appeared too close to the deadline -- or even after the deadline -- for bid submittals.
- * Was the letter of solicitation sincere? The Board looks to see if a copy of the contract proposal is

included and if adequate time frames for responses are provided.

- * How seriously did the firm consider responses to its solicitations? Simply rejecting them on grounds that they would be forced to submit a higher-price bid may not be good enough, but the Board really has no standard to differentiate a good reason from a bad one.
- * Exactly who is a minority? There are federal standards, local government standards -- and a state standard that now straddles the two. A recent change in state law excludes Portuguese from the program, even though Portuguese are eligible for federal programs.
- * When did the bidder contact the appropriate state and federal agencies? The contacts must come after the RFP has been released and they must be made each time a new contract is circulated, regardless of how many previous times the bidder has contacted the same agencies to get MBE/WBE/DVBE listings for other contracts.

Good-faith effort problems defeat program purpose and credibility

roblems with the good-faith effort element of the MBE/WBE/DVBE program abound. The significant result is that the credibility of the program as a viable means of broadening participation in state contracting is seriously undermined. The existence of a paper-shuffling loophole allows many prime vendors to ignore the intent behind the program and provides unfortunate reinforcement for the doubts of those MBE/WBE/DVBEs who never believed the State was serious to start with.

Certification: Almost as troublesome as the good-faith effort element of the program has been certification. MBE/WBE/DVBEs need to be at least 51 percent owned by the qualifying person and that person needs to be in daily control of operations. Depending on the purchasing agency, the means of verifying that a business qualifies as a MBE or WBE differs (DVBEs are centrally certified by the Office of Small and Minority Business, much as small businesses are).

Certification rules differ depending on whom vendor deals with

he lack of centralized administration shows up in this element of the program more than in any other. Simply because a firm is certified to do business with one department of state government does not mean its certification will be accepted elsewhere. In fact, a company that wanted to do a broad range of governmental business in California would have to seek 80 different certifications, according to one procurement expert.⁷⁷ Some might be rigorous such as the Caltrans federal certification; others might be simply a matter of signing a piece of paper, the process used by the Department of General Services known as self-certification.

A recent addition to the MBE/WBE/DVBE law is expected to assist firms by creating a single repository for certifications. Under the new law, Caltrans will operate a program called CalCert. Any state or local government that uses or accepts a certification process identical to the federal government requirements will be able to use the Caltrans database reciprocally. A person who certified his firm with Caltrans, for instance, would know that his certification would also be good for certain cities and counties.

CalCert, unfortunately, will have limited value at this time among state agencies, most of which accept the simple, unverified self-certification process established by the Department of General Services. Firms certified in this manner are not eligible for inclusion in the Caltrans database. Also, CalCert -- as a repository of information rather than a certification center -- falls short of a one-stop state certification authority. There will still be no single answer when a MBE/WBE/DVBE firm tries to find out how it can become certified and who is in charge.

Full certification is key to stopping fraud and bolstering program credibility

here is no disagreement that a full certification process, with proper investigation and verification of status, is the preferred method for ensuring program credibility and effectiveness in actually reaching the businesses it was meant to assist. Writing about the drawbacks of the Department of General Services' present self-certification program, the director of the department said:

Self certification encourages misrepresentation and even fraud by unscrupulous individuals and/or businesses. In the case of husband and wife-owned businesses, it may be that the couple does not realize that in order to qualify as a women-owned business enterprise, the female must control the daily business operation. In other instances, the self certification may be intentionally forwarding misinformation in order to

obtain a competitive advantage. This problem area could be substantially improved with the establishment of a full certification program. Such a program is encouraged by the present administration. Unfortunately, a full certification program is expensive. Given the present business climate and the condition of the state budget, it is questionable as to whether we can convert to a full certification process in the near future.⁷⁸

In the absence of full certification, fraud can and does take place, although it is difficult to determine how prevalent it is. Instances of fraud, some of them documented in protest actions, include:

- * A "former" employee of the prime contractor who got a business license and established a minority firm the same day the bid was submitted.
- * A company-employed janitor who was listed as a subcontractor with his own minority firm as part of a bid.
- * A contracting firm became a woman-owned firm. The woman was the "significant other" of the man who previously owned the firm; the address was in the same building as another firm owned by the man; and when mail addressed to the woman-owned firm was delivered the notice on the door said to leave it in the office of the man's firm.
- * A vendor tried to reach the woman listed as the owner of a firm, but she was never there, making it unlikely that she was in day-to-day control of operations.
- * A husband wanted to make his family firm a woman-owned business by making his wife the owner -- but he could not bring himself to change the name of the firm, which was his full name.

The federal government issues a 70-page manual to set out criteria and pitfalls to watch for when certifying Disadvantaged Business Enterprises. The firms are supposed to be independently owned and controlled by the socially and economically disadvantaged person. Firms must be in existence, operational and in business for a profit. The disadvantaged owners of the firm must possess the resources or the expertise to operate in the

firm's field of work. And the firm must provide evidence that they do not just exist on paper and that they were not organized in an attempt to take advantage of the program.

The federal certification manual offers profiles of suspected fronts that should be weeded out:

- * A woman-owned business where the woman is the wife, daughter or office secretary for a non-minority male. Education is usually high school with little or no training in the field of operations. Stock ownership will usually be a gift and distributed in such a way to meet the 51 percent ownership goal, with the non-disadvantaged person holding 49 percent. The woman's salary is either minimal, none or less than the non-disadvantaged males. The decision maker is the father, husband or former boss. Or the bonding company, insurance company, CPA or attorney is the husband, father or former boss.
- A minority-owned business where the former or current non-disadvantaged employer owns an interest in the firm. Education is usually high school or less, with little training in business operations but experience in lower-level field No managerial or administrative activities. experience. Salary is less than or equal to nondisadvantaged person. Financing is provided by non-disadvantaged person as a corporate loan. non-disadvantaged The person jointly independently exercises authority in most areas of control. Contracts are almost exclusively with the same non-disadvantaged contractor.
- * Corporate spin-off where former disadvantaged employee continues to work and puts in only part-time effort for new business. Financing is usually by the former employer. Disadvantaged person lacks managerial experience and relies on former employer. Bonding company, insurance company, CPA and lawyer are usually the same as those for the corporation owning 49 percent of the spin-off.⁷⁹

MBE/WBE/DVBEs find certification too complicated to complete

Besides opening the door to fraud, the certification process also appears to serve as a significant barrier to participation by many otherwise eligible MBE/WBE/DVBE. Except for the self-certification program, the certification process can be labor intensive,

requiring firms to compile documentation and fill out forms that are more extensive than that required by the IRS at tax time. Utility companies (who under a separate law also must reach goals of 15, 5 and 3 percent and are who in 1993 are allowed only to count certified firms) have faced great difficulty in getting firms to go through the certification process.

MBE/WBE/DVBEs that do go for full certification are frustrated by the long delays and by the need for annual re-certification for those following federal guidelines. Caltrans indicated that of the 600 applications it receives each month, it is only able to process about 100, leading to backlogged requests.

Between the discouraging effect full certification can have on participation and the ample opportunity for fraud afforded by self-certification, the certification element of the MBE/WBE/DVBE program is one more area where credibility is undermined and state resources are strained.

Enforcement: The Commission could find no evidence of enforcement mechanisms to ensure the integrity of the MBE/WBE/DVBE program. No one in the Department of General Services and no observers of or participants in the program could remember a single case where a firm had been charged with or prosecuted for committing fraud in presenting a good-faith effort, certification or contract performance. The reason cited is a lack of resources to investigate complaints of fraud.

MBE/WBE/DVBEs themselves were the ones who most frequently cited the lack of enforcement as a key problem with the program. Those who protested bid awards based on what they believed were insincere or fraudulent good-faith efforts complained they could not push the State into fully investigating vendors' documentation. Some charged that MBE/WBE/DVBEs listed as being sent solicitations never received them while others were shown as subcontractors although they had never reached an agreement with the prime vendor.

Enforcement is key to forcing bidders to use firms they list in bid

any MBE/WBE/DVBEs also said that enforcement through retrospective audits is critical for ensuring that subcontractors listed are actually used and paid for their work. Too often, they said, a bidder claims to have fulfilled the goals but then does not bother to use any subcontractors at all. They also said prime contractors sometimes squeeze MBE/WBE/DVBEs after the contract has been won, negotiating to get them

to accept a lower amount for their work and using the threat that they will find someone else if the firm does not accept less money.

In June 1991, the Department of General Services announced that the Office of Small and Minority Business would develop an audit program that would look at a small statistical sampling of contracts and also investigate any complaints brought to its attention. But the announcement noted that funding was short and that audits would therefore be limited. No audits have turned up fraud in the program yet.⁸⁰

Program increases costs but has potential to cut prices over time

n addition to the three troublesome areas of good-faith effort, certification and enforcement, the MBE/WBE/DVBE program places a budgetary burden on departments. By broadening the pool of companies with which the State does business and increasing competition, the program has the potential for lowering state costs by cutting prices. But in its current, poorly run form, the program adds to the state administrative workload and private enterprise's cost of doing business. Reforms that would address the problems outlined above -- such as a full certification process, increased enforcement efforts or centralized administration -- would add to state costs substantially.

It is difficult to pin down the added private industry costs. If one vendor's estimate of \$1,000 were used and three bidders were presumed to compete on each of 80,000 state procurements, the cost would be \$240 million. But MBE/WBE/DVBE requirements are not included on all contracts, and a substantial number of contacts have only a single bidder while others have far more than three. Despite the difficulty in determining a true figure, it is safe to presume there is some degree of added cost that eventually finds its way into private enterprise's overhead and is passed on to customers, including the State.

State has no firm figures on program costs or savings of the MBE/WBE/DVBE program. Added costs come to the State in two forms: the direct administrative cost of the extra requirements in the procurement process and the higher price paid when lower bids are rejected for non-compliance with MBE/WBE/DVBE requirements. Unfortunately, statistics also are not available that might indicate state savings from lower prices caused by increasing the amount of competition through expanding the pool of vendors.

The Commission was able to gather some indication of the dimensions of added costs from a variety of departments and sources. The following partial statistics were documented:

- * The Department of Corrections spends about \$400,000 a year on staff dedicated to helping the department reach the goals. Their activities include a substantial outreach and educational program for vendors. In addition to the administrative costs, the MBE/WBE/DVBE requirements also caused the department, in the first 10 months of 1992, to spend \$1.2 million extra by accepting contracts with other than low bidders when the low bidders failed to comply with the requirements.⁸¹
- Caltrans, saying it was difficult to winnow out the costs from the cost of all other requirements of government, nonetheless believes it spends about \$1 staff to implement million on MBE/WBE/DVBE program, including operating a substantial certification program. About 10 out of 700 contracts in a year may be awarded to someone other than a low bidder because of failure to comply with the MBE/WBE/DVBE program. Asked about how much the program adds to the total cost of his operation, the Caltrans director told the Commission: "It's not 50 percent, but it's not 5 percent either -- it's somewhere in between. It's not free."82
- * The Department of General Services said that during the first 10 months of 1992, more than \$3 million was spent by awarding contracts to other than low bidders (who failed to meet MBE/WBE/DVBE requirements) in procurements tracked by the department. The figure for 1991 was \$2.2 million.⁸³
- * San Jose State University said that costs during the first six months of 1991 were \$82,595 for contracts awarded to other than low bidders because of MBE/WBE/DVBE problems. Added costs for administration included 80 percent of a full-time office assistant position.
- * The Employment Development Department said it has seen numerous contract awards that were \$30,000 to \$50,000 above the low bid because of MBE/WBE/DVBE requirements.

* PG&E, which operates a MBE/WBE/DVBE program under a separate but similar law, spent \$2.2 million on administration and outreach during 1991. The utility said the costs represented seven-tenths of a percent of the \$320 million in contracts won by MBE/WBE/DVBEs, a figure that the company said is substantially lower than the 5 to 10 percent cost of similar programs nationally.84

It is worth noting that the two departments in State government that consistently meet and/or exceed the goals have dedicated a substantial amount of resources to making the program work. The utility, which spends more than both departments combined, is also successful in meeting goals.

Successful programs use resources for outreach, education and verification

hat makes their programs work when other departments and entities are not able to reach the goals? Their efforts include outreach to find MBE/WBE/DVBE vendors willing to participate in state contracts and capable of providing needed services and goods; education for other vendors on how the program works, its importance and where to find appropriate MBE/WBE/DVBEs for subcontracts; and some degree of verification in terms of certification and actual contract participation.

In addition, utilities have two advantages that state departments do not enjoy: They are able to award a contract to other than a low bidder at their own discretion, and they are able to recapture the cost of running the program through increased rates to power purchasers. State departments are not able to arbitrarily pick contract winners simply to meet MBE/WBE/DVBE goals. And they have not been given a separate appropriation that allows them to focus staff and resources on the program.

New law gives departments more flexibility but keeps good-faith effort law that became effective January 1, 1993, is designed to give departments new flexibility in administering the MBE/WBE/DVBE program, but it is unclear how successful the revisions will be in providing tools that departments can use to reach goals. The new law allows departments to reach the goals on an annual budgetary basis rather than on a contract by contract basis. This will allow departments to exempt some procurements from MBE/WBE/DVBE requirements when in their judgment sufficient firms do not exist to make subcontracting feasible or when subcontracting opportunities do not exist. It also means that contracts that exceed the goals can be used by the department to

counterbalance contracts where the good-faith effort process has allowed none of the goals to be achieved.

Departments, however, are still required to select the low bidder, and they have no control over the choice of bidders to pursue good-faith effort documentation rather than working partnerships with MBE/WBE/DVBEs. This leaves the departments between the rock of legislative intent that they reach the goals and the hard place of not being able to ensure that bids will include participation.

One concept that has been advocated by various vendors, MBE/WBE/DVBEs and critics of the program is to eliminate the good-faith effort process. Departments would use their discretion to not require compliance when sufficient subcontractors did not exist, but in all other cases contractors would have to meet the goals or be deemed non-responsive to the bid request. With good-faith effort's many problems of implementation and verification, such a course is attractive. However, there are legal experts who believe the good-faith effort component is critical to keeping the State's program constitutional. Precisely because the good-faith effort does allow vendors to avoid complying with goals, California's program does not appear to violate guidelines that have been established by the Supreme Court.

The California program was established on the heels of a Supreme Court decision known as City of Richmond v. J.A. Croson Inc. Richmond had an ordinance which required contractors to either be minority-owned firms or to subcontract 30 percent of the contract with minority-owned firms. Waivers would be allowed only in "exceptional circumstances" of inability to comply. Croson was the intended awardee on a contract to refurbish a jail. As a non-minority, Croson's only option was to subcontract the plumbing portion of the bid, about 75 percent of the contract. The only minority firm that responded was 7 percent over market price. Croson argued for a waiver, saying it was not economically feasible to perform the contract under those conditions. Richmond rejected the waiver and rebid the contract, and Croson sued.85

Supreme Court set rigorous parameters for anti-discrimination

he Supreme Court took the opportunity to differentiate between what the federal government is allowed to do in forming anti-discrimination programs and what state and local governments are permitted to do. It set four rigorous standards that state programs must meet:

- * Strict scrutiny standard of review. This standard requires that when race-based remedies are used there must be a compelling state purpose and the means must be narrowly tailored.
- * Identifiable discrimination directly related to agency. A general finding of societal discrimination is not adequate. The entity must conduct a disparity study that shows actual discrimination and measures its extent by comparing available minority firms and the proportion of their use in the past. While actual statistical evidence of discrimination is required, the court also viewed anecdotal evidence as important to building the case for remedial measures.
- * Attempt at using non-race based remedies. Before adopting a race-based program, the entity must show that it has tried other non-race methods of reaching minority-owned businesses, such as outreach and financial assistance with bonding and capital requirements.
- * **Proportionate remedy.** The solution must be based on the nature and extent of the past discrimination. The program must be limited in scope and duration, being in place only long enough to reverse the effects of past discrimination.

Other court decisions since Croson have required the use of goals set on a case-by-case basis rather than rigidly applied throughout a program, and have held that a lower standard of proof of past discrimination is permissible for programs designed to benefit womenowned businesses.⁸⁶

Since the Croson decision, dozens of state and local ordinances across the nation have been rejected or reformed. No successful or serious challenge has been mounted to the California program, however. The program meets none of the court's standards since no study -- often called a disparity or predicate study -- was performed before the program was created, although many legislative hearings were held and anecdotal evidence was compiled. However, the program, with its good-faith effort escape hatch, also does not compel the awarding of contracts to minority-based firms, leading some legal experts to conclude that it is immune from the court's strict standards.

Goal is to make program more effective without threatening viability

s stated early on in this section, the Commission has proceeded with the presumption that state policy makers created the MBE/WBE/DVBE program with the intention that the goals will be reached. The dilemma, then, is finding mechanisms that will make the program more effective without requiring massive budgetary support while at the same time meeting standards prescribed by the courts.

In its studies, the Commission typically reviews reform options and identifies the best alternative in its recommendations. The MBE/WBE/DVBE program, however, is not only a sensitive but also a complex issue that requires reconsideration by policy makers and the selection of a preferred direction. The Commission, therefore, has provided options for policy makers, detailed on the following page:

Recommendation 17: The Governor and the Legislature should pursue one of three options.

OPTION A	OPTION B	OPTION C
The Governor and the Legislature should enact legislation to contract for a disparity study and a recommended proportionate remedy as a prelude to adopting an aggressive, antidiscrimination procurement program.	The Governor and the Legislature should enact legislation that will recast the present MBE/WBE/DVBE program so that it operates similarly to the Small Business preference program.	The Governor and the Legislature should enact legislation that centralizes the authority and accountability for the MBE/WBE/DVBE program and provides adequate resources for outreach and enforcement efforts.
The disparity study would quantify discrimination in the past and make recommendations for a narrowly tailored, time-limited program that would redress past practices in accordance with Supreme Court guidelines. The present MBE/WBE/DVBE program would be considered one of the State's efforts to provide an educational, raceneutral program (in that no contracts are forcibly awarded to minority-owned firms) to address past discrimination. The State could expect to see recommendations similar to those made by consultants for Sacramento in a recent disparity study (please see Appendix D for an excerpt from the study).	Bids incorporating certified MBE/WBE/DVBEs would be given evaluation points based on a sliding scale of the percentage use. Just as in the Small Business program, there would be a cap on how much extra the preference could cost the State, and the eligibility of MBE/WBE/DVBEs would be linked to their size (based on the concept that large, successful firms need no special assistance). The Commission has received split advice on the constitutionality of such an approach, which would need to be carefully crafted to provide incentives for businesses to use MBE/WBE/DVBEs without blocking others that do not. The primary advantage of this approach is that it shifts the responsibility and incentive for meeting the goals to private industry. The system rewards those who seek MBE/WBE/DVBE partnerships.	To retain the present program but make it more effective, it is vital that responsibility be vested in one place. This will allow a uniform approach to its implementation (including standardization of what expenditures count towards participation), tracking of results and streamlining of procedures. The logical place for centralization of authority is the Department of General Services (although this should not preclude Caltrans continuing to play a lead role in the certification process).

egardless of the overall direction for reform chosen by state policy makers, the underlying goal should be to produce a program that works. The Commission believes that will most likely happen if two things occur: If there is a specific, centralized place for accessibility, accountability, authority and responsibility, and if the program's underpinnings are shifted so that the private sector has incentives for wanting to make it work.

In addition, some steps need to be taken to revamp troublesome aspects of the current program while policy makers are considering the program's future.

Recommendation 18:

The Governor and the Legislature should eliminate the good-faith effort component of the MBE/WBE/DVBE program or reform the process so it achieves its intended purpose.

ith the ability of departments to exempt contracts from MBE/WBE/DVBE requirements when subcontracting opportunities do not exist, it can be argued that the good-faith effort process serves little purpose. However, if it is retained -- either for its educational outreach value or its constitutionality function -- the State should take several steps to eliminate its misuse.

Although the good-faith effort process is already viewed by vendors as costly and burdensome, the Commission does not recommend easing requirements as this would only result in its increased use and further erosion of incentives to meet the goals rather than avoid them. To make good-faith a less attractive option that will not be routinely used, the State should strengthen the tests used to determine the validity of a good-faith effort. The U.S. Department of Transportation, Florida and Oregon all have strict standards that require bidders to document negotiations with MBE/WBE/DVBE vendors and to justify their decisions not to use them. The argument of higher cost is not considered adequate justification. (Please see **Appendix E** for excerpts of the provisions used by these jurisdictions.)

In addition, the Commission sees no particular reason for the State to create a new industry of specialized newspapers through the good-faith effort advertising requirements. Instead, the State should capture for itself the resources now spent on advertising

and use them to further the goals of the program. This would be accomplished by enlarging the State Contracts Register to include all contracts with MBE/WBE/DVBE requirements. Those who wanted to document a good-faith effort could satisfy the advertising requirement by placing ads in the State Contracts Register. All MBE/WBE/DVBE organizations and firms would know that the Register was the single source of complete information. The State could use the increased revenues from Register subscriptions and advertisements to cover the costs of producing the Register, with excess sums diverted to cover educational, certification and enforcement costs.

Recommendation 19: The Governor and the Legislature should enact legislation to abolish self-certification and set up a single-point full certification process.

he potential for fraud and the resulting credibility problems suffered by the MBE/WBE/DVBE program cannot be addressed as long as a major mechanism for qualifying for the program is to self-certify that a firm is a minority, women or veteran-owned firm. MBE/WBE/DVBEs need the reliability and accessibility of a single point of reference for all certification activities and questions. Non-MBE/WBE/DVBEs need access to a reliable database of potential vendors that can act as subcontractors. And the State needs a centralized repository where it can check compliance with the program's requirements.

In addition, the full certification process should be streamlined as much as possible; for instance, sole proprietorships should have to document little more than past Schedule C income tax filings and passport or birth certificate proof of status as a minority or woman. And the State should continue to press the federal government to allow for recertification every two years instead of annually.

Recommendation 20: The Governor and the Legislature should direct the Department of General Services to embark on an aggressive enforcement program.

include enforcement program should retrospective audits to ensure that contractors use identified MBE/WBE/DVBE subcontractors. Penalties for fraud should include prison terms, monetary damages and disbarment from bidding on future state contracts. A description of these penalties and a signed declaration, under penalty of perjury, MBE/WBE/DVBE requirements have been met should be included on the form the State gives contractors before releasing final payments.

Recommendation 21: The Governor and the Legislature should enact legislation that allows firms to file "global" plans with the Department of General Services as an optional way of complying with MBE/WBE/DVBE requirements.

o avoid complicated bookkeeping procedures that would link company expenditures to particular state contracts or to a specific level of annual state contracting, the State should set goals for companies to reach internally as an optional way of qualifying for having met MBE/WBE/DVBE goals. For instance, the State could give automatic qualifying status to companies that prove they spend 30 percent -- rather than the contract-by-contract requirement of 23 percent - of their annual internal procurement dollars on certified MBE/WBE/DVBE firms for things such as insurance coverage, supplies, janitorial services and consultants. Such an option would stimulate private enterprise to do business with MBE/WBE/DVBEs, thus allowing the State to fulfill its goal, even though not directly with State dollars.

Recommendation 22: The Governor and the Legislature should enact legislation to protect past and current vendors in the event the State's MBE/WBE/DVBE program is found unconstitutional.

hile the State firmly believes its present program is constitutional, it is conceivable that the courts could take a different view. Some legal experts have worried that invalidation of the program in the future would place contractors in jeopardy by voiding past contracts and making the state expenditure of funds connected with those contracts illegal. A law should be enacted to ensure that contracts awarded under the MBE/WBE/DVBE program are valid even if the MBE/WBE/DVBE program is later found to be unconstitutional.

Prison Industry Authority

- * State departments forced to buy goods and services from the PIA are unhappy about price, quality and delivery delays.
- * The PIA cannot demonstrate its effectiveness in preparing inmates for the working world.

Recommendations:

- * Allow departments the discretion to choose either PIA or private sector products.
- * Document hidden costs and subsidies.
- Improve inmate hiring procedures.
- * Require tracking of former PIA inmates to document success of program.

Prison Industry Authority

nmate work programs have long been a part of the theory and practice of penal systems. Such programs provide prisoners with opportunities to learn a trade or skill, develop solid work habits and earn money and/or reduced-sentence credit, as well as holding out the promise of allowing government to offset the cost of housing and maintaining prisoners. But they also have long been criticized as taking away jobs from the private sector, being too costly and inefficient, and not providing realistic training for life in the outside world. Both the perceived benefits and the pointed criticisms have played a role in the creation and operation of California's current inmate work program.

The Prison Industry Authority (PIA) was created in 1982 to replace the Correctional Industries Commission, which the Legislature determined had failed both to offset the cost of running the prison system and to provide productive rehabilitation of prisoners. The new law set out the following purposes for PIA:

A) To develop and operate industrial, agricultural, and service enterprises employing prisoners in institutions under the jurisdiction of the Department of Corrections, which enterprises may be located either within those institutions or elsewhere, all as may be determined by the authority.

- B) To create and maintain working conditions within the enterprises as much like those which prevail in private industry as possible, to assure prisoners employed therein the opportunity to work productively, to earn funds, and to acquire or improve effective work habits and occupational skills.
- C) To operate a work program for prisoners which will ultimately be self-supporting by generating sufficient funds from the sale of products and services to pay all the expenses of the program, and one which will provide goods and services which are or will be used by the Department of Corrections, thereby reducing the cost of its operation.⁸⁷

Under the guidance of a board appointed by the Governor and the Legislature, the PIA operates 71 different enterprises at 24 facilities, employing about 740 staff and almost 8,000 inmates. The PIA produces almost \$150 million of goods and services annually. By law, PIA products and services may only be sold to the state government or to local governments. Also by law, state government agencies are compelled to buy available goods and services from the PIA rather than from the private sector -- regardless of price, quality or other factors.

The following table lists the locations of PIA enterprises:

PRISON INDUSTRY AUTHORITY PROGRAM LOCATIONS

Pelican Bay	Tracy	Chino
Susanville	Chowchilla	Norco
Folsom	Soledad	Lancaster
Vacaville	Corcoran	Los Angeles
Mule Creek	Avenal	Frontera
Stockton	Wasco	Blythe
San Quentin	Tehachapi	San Diego
Jamestown	San Luis Obispo	Calipatria

Source: Prison Industry Authority

s the table indicates, prison work programs are spread throughout the State. They occur at institutions for both genders and at all levels of security.

The following page, a promotional handout provided by the PIA, lists the program's products and services.

Product Lines

california (california prison industry authority 560 East Natoma Street

Folsom, CA 95630-2200



BEDDING

Bodspreads Mattresses and Covers Pillows and Covers Mattress Refurbishing

CLOTHING / TEXTILES



Casual Wear Outerwear Specialty Clothing Clothing with Silkscreening



DETENTION EQUIPMENT (Total Jail Furnishings)

Day Room Cell Equipment Lockers Mess Hall Tables Electrical Coverplates Stainless Steel / Kitchen Equipment Architectural Design Items



DETERGENTS

Disinfectants Laundry Dishwashing Janitorial Supplies Utility Cleaners



FIBERGLASS

Containers Tables with Seating Lifequard Towers Wall Panels Ash Trays

Laundry Carts Wash Sinks Tanks Modesty Panels Custom Products



FLAGS

Indoor and Outdoor California United States Departmental



FURNITURE (Wood and Metal)

Acoustical Screens Wood/Metal Office Computer Library Residence Hall

Lunchroom Lounge Reception Steel Shelvina Steel Cabinets / Wardrobe



FOOD PRODUCTS

Meat Sausage Bread Milk

Eggs Chickens Coffee

KITCHEN EQUIPMENT

Tables Carts Racks, etc.

Food Grade Wall Panels

Skids

NFS Approved-Aluminum and Stainless Steel



MISCELLANEOUS

Corrugated Cartons Mulch Concrete Precast Silhouette Targets Concrete Fire Rings Gun Cleaning Tubes

Mechanics Creeper Glove Pauches Food Products Patrol Vehicle Metal Items Weight Lifting

Equipment



SIGNS

Decais Road and Traffic Regulatory

Stickers and Tags Mesh Signs / Vests Bumper Stickers



SHOES, BOOTS AND GLOVES

Dress, Work and Leisure Shoes, Men and Women Firemen and Forestry Boots Work Gloves, Men and Women Welders Gloves - Firefighters Gloves



SPECIAL METAL AND WOOD PRODUCTS

Industrial Steel Shelving Metal Storage Cabinets Consultants for your Special Design Projects



SPECIAL SERVICES

Key Data Entry Micrographics Vehicle Refurbishing / Restoring Silkscreening on Clothing

Ophthalmic and Safety Evewear Furniture Refinishing Reupholstery Printing Laundry



STATIONERY PRODUCTS

Ring Binders with or without Silkscreening Conference Folios Diploma Covers Business Card Holder

Log Books Decats, Stickers and Labels Custom Vinyl Products

Brief Cases



Customer Services

(916) - 355-0213 ATSS 438-0213 FAX 355-0247



The following table breaks down PIA sales by product category for 1990-91:

PRISON INDUSTRY AUTHORITY PRODUCTS BY AMOUNT OF SALES, 1990-91

PRODUCT	SALES (Millions)	% OF TOTAL
Textiles	\$37.0	25.1
Wood (Office, dorm furniture)	19.7	13.4
Metal (Cell furnishings, lockers, shelves)	17.3	11.7
Laundry	13.3	9.0
Dairy/ Farm	12.3	8.3
License Plates	9.9	6.7
Meat, Chicken, Eggs	8.1	5.5
Shoes, Gloves	7.0	4.8
Precast Concrete	4.5	3.1
Printing	3.5	2.4
Bindery	3.4	2.3
Optical	3.0	2.0
Detergents	2.5	1.7
Bakery	1.3	.9
Key data	1.1	.7
Coffee	.8	.5
Cardboard Boxes	.6	.4
Fiberglass	.5	.3
Vehicle Repair	.4	.3
Metal Signs	.3	.2
Micrographics	.3	.2
Reupholstery	.2	.1
Other	.6	.4
TOTAL	\$147.6	100

Source: Prison Industry Authority

s the table on the previous page indicates, about half of the products made by the PIA are types of furnishings and clothing, while an additional 6.7 percent are license plates for the Department of Motor Vehicles. The table below looks at the products from the perspective of who purchases them:

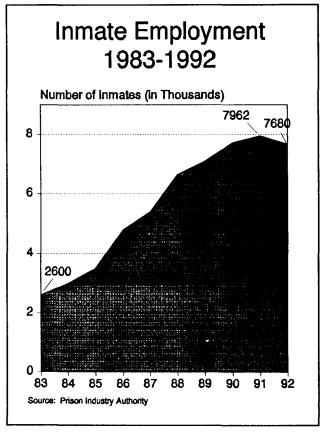
PRISON INDUSTRY AUTHORITY PRODUCTS BY CUSTOMERS, 1990-91

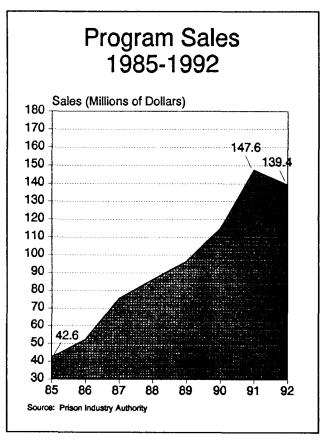
BUYER	SALES (Millions)	% OF TOTAL
Corrections	\$80.2	54.3
Motor Vehicles	13.8	9.3
State Hospitals	11.4	7.7
Youth Authority	6.0	4.1
Health and Social Services	4.5	3.1
State Universities	4.5	3.1
Transportation	3.2	2.3
General Services	3.1	2.1
Forestry	1.3	.9
Conservation	1.2	.8
Other State Departments	9.8	6.6
Total State Depts.	139.0	94.2
Local Governments	8.6	5.8
TOTAL	\$147.6	100

Source: Prison Industry Authority

s the table indicates, the largest single customer for Prison Industry Authority goods and services is the Department of Corrections, which buys more than 54 percent of the products to feed, house and clothe inmates. The next largest purchaser is the Department of Motor Vehicles, which buys 9.3 percent of the products produced. The state hospitals, the Youth Authority and the universities -- all of which provide housing and furnishings for people -- are also large customers of PIA.

While the PIA's sales and use of prisoners has grown steadily over the years, the latest year's figures have declined, as the two charts on the next page indicate:





have dropped for 1992 and the PIA is employing fewer inmates. The reversal is attributed to the State's repeated budget cutbacks, which have decreased the ability of state departments to buy furnishings, goods and services. The PIA also is attempting to trim and streamline operations to avoid having enterprises that cost more to operate than are generated in sales.

Armed with the information and statistics above, the Commission examined the PIA, discussed its performance with PIA customers and attempted to gauge the program's effect on prisoners.

Finding 7:

The Prison Industry Authority, heavily and unwillingly subsidized by other areas of state government, is unable to document its degree of success in meeting program goals.

he Prison Industry Authority has a captive customer base in other state departments, which are forced to buy its goods and services. These customers, who have no leverage over PIA's performance, contend the products are overpriced, deliveries are often delayed and that quality is sometimes poor. The PIA defends its record, claiming that prices are actually low for the quality of goods sold and that its activities save the State almost \$48 million a year. But the PIA is unable to show success in preparing prison inmates for the outside world, and its claims of providing cost savings evaporate quickly under scrutiny.

High prices lead list of complaints by PIA customers

he Commission found that frustration was the key note sounded by various department officials who find they must do business with the PIA. The PIA may provide waivers to allow departments to buy goods and services from the private sector if there is an emergency need or the PIA cannot produce the required goods or services in a timely manner. Lower price is not a valid reason for requesting a waiver. In 1991-92, the PIA approved 859 requests for \$5.6 million in waivers. But for those who cannot obtain waivers, the forced purchases from PIA are a sore point. Their first and foremost complaint is about high prices that far outstrip

what would be paid in the private sector and therefore place an intolerable burden on department budgets. Examples brought to the Commission included:

- * California State University at Sacramento complained in 1992 that it could have purchased computer work tables for \$87,000, with immediate delivery. Instead, it was forced to wait nine months and pay \$104,000 for the same quality product -- an added cost of \$17,000.89
- * A furniture retailer said he found several manufacturers who would follow specifications exactly to duplicate PIA's guest chair (#6264) at a cost of \$70 or less. PIA charges \$140 for the chair. 90
- * The same furniture retailer told of two state employees who selected 22 swivel chairs and six conference tables from the retailer's show room. They relayed the furniture specifications to PIA, hoping to get a waiver that would allow them to purchase the furniture from the retailer. Instead, PIA decided to produce the furniture. The cost from the retailer: \$7,446.60. PIA's price: \$13,710.91
- * A Humboldt State University official outfitting a new dormitory found a private vendor who would supply 252 beds at \$180 apiece and 253 three-drawer chests at \$225 each, for a total order of \$102,285, including delivery. The PIA provided the furniture instead -- beds at \$370 and chests at \$445 -- for \$205,825. The difference: \$103,540.92
- * California State University at Chico documented a series of "creeping" prices where billings differed from the amounts quoted by PIA sales personnel. A desk that was quoted as costing \$505 was billed for \$510 plus a 2 percent surcharge of \$10. An order for 46 chairs at \$99.25 each was billed at \$109 each, for an added cost of \$448.50. A desk that was supposed to cost \$370 was billed at \$400 plus a 2 percent surcharge of \$8, for an added cost of \$38.93
- * In the offices of the Little Hoover Commission, staff identified a \$99 bookcase offered by a private company that met its needs. Instead, staff

was required to purchase a \$260 bookcase that provided the same amount of shelf space.

PIA says prices reflect high quality of its goods

he PIA, however, maintains that its prices are not out of line and points out that PIA products come with no state sales tax charged, a savings of between 7 and 8 percent (depending on the county). In supplying a 1987 PIA internal memo to the Commission, the PIA's General Manager said that the memo detailed a study that concluded that "although PIA's furniture was higher priced, the quality of the products were such that they were expected to last longer and would therefore, in effect, be less costly for the consumer because of the greater life expectancy."

The study, conducted by a PIA management services technician, said:

It was extremely difficult to find wood furniture products comparable to PIA's. Products of similar quality sell for considerably higher prices and ones of similar prices are of a lesser quality....

The PIA modular line consists of such high quality materials and features that, if found in private industry, it would sell for twice the price. Some of these quality features include solid wood framing and edging, high-quality laminates, solid-wood drawer construction with dovetailing and glides, overall locking, tablet slides, wood pencil trays, foot rests, high quality hardware and adjustable base glides....

It is evident that PIA prices could be raised significantly on various wood furniture products, but if customers are looking for lower prices to fit their budgets and not necessarily high quality, the purchase of these products from a cheaper source is likely to be their decision. It is difficult to make a profit without raising prices or reducing costs. To compete with companies that make an inexpensive, lower quality product, it might well be to PIA's advantage to consider production of an economy line. 95

Appended to the memo were several pages of price comparisons for different items. An example of the comparative prices is provided in the table below:

PIA Internal Study of Prices (1987)

DESK SIZE	PIA PRICE	"COMPARABLE PRODUCT" PRICE	"LESS QUALITY PRODUCT" PRICE
42 X 76	\$366	\$455	\$339
34 X 76	\$340	\$430-\$451	\$251
34 X 60	\$329	\$408	\$179-\$269

Source: Prison Industry Authority

t is interesting to note that the only products judged comparable by the PIA person performing the study were from Colorado and Virginia Prison Industries. Products of the same size but classified as "less quality" were from private firms.

To further bolster the case for quality pushing up prices, the PIA gave the Commission a 1989 letter distributed by California State University purchasing officials to all campuses. The PIA General Manager indicated that the letter shows that the university system "has determined that the quality and durability of PIA products makes their pro rata cost considerably less than many initially less expensive, but less well-built, competing products."96 The letter, written as a pep talk to encourage campus procurement officials to work more closely with the PIA since they must buy goods and services from them, acknowledged pricing concerns and indications from PIA that it would be producing furniture in the future to withstand heavy use. However, the letter does not conclude that PIA products are a better buy:

PIA products pricing, particularly of furniture items, is a matter that campuses must continue to weigh as it relates to quality and their campus budgets. For example, many of the furniture items that are now planned to be manufactured by PIA are being designed to withstand harsh treatment from the users, perhaps more so than might ordinarily be the case for similar items manufactured and stocked in the open market by competing companies....

If the frequency with which furniture must be replaced or repaired can be minimized, funds can be freed up in subsequent years to be used for other purposes. For example, \$500 spent on 100 units which last for five years results in a cost of \$10,000 per year, as amortized; but spending \$800 apiece for 100 sturdier units which prove to last for 10 years, costs only \$8,000 a year. The resulting difference of \$2,000 per year, or \$20,000 over the 10-year life of the units, could be applied to other needs.⁹⁷

PIA customers do not support theory that quality is high he letter goes on to speak of a then-recently renewed commitment on the part of PIA to work closely with campuses on pricing, quality and delivery issues. This 1989 letter is worth noting in light of PIA's later performance and university complaints:

- Humboldt State University wrote in May 1991 that of 400 mattresses purchased in August 1990, 240 were collapsing and the remainder were not expected to last another year. Mattresses purchased in 1988 and 1989 also were disintegrating. The University official wrote: A mattress should have a 10-year life span, not one or two....The quality of Prison Industry mattresses is more than questionable in this case. I have budgeted funds to replace 230 mattresses and will also need 252 mattresses for our new housing complex. I have no confidence in Prison Industry mattresses and hereby request a waiver from Prison Industries to purchase these mattresses on the open market.98
- * A Chico State official found the quality of work stations lacking: ...a good percentage of the work stations are falling apart. Specifically, the fiberboard bookshelves are not holding and appear to be weakly jointed and supported....This is presenting a real potential of toppling over on students and staff, a serious hazard that cannot be overlooked. We have experienced a variety of other problems with the work stations as well, including sagging of work surfaces and bowing of partitions.⁹⁹

The universities are not alone in their complaints. An Employment Development Department official said high-priced chairs purchased from PIA are wearing out rapidly from lack of seat support. And other departments argued that the decision to purchase higher quality items at a higher price should be left to a department's discretion rather than forced by law.

Delivery delays are also a major concern of PIA customers n addition to concerns about pricing and quality, PIA's customers also complain about long delays in receiving goods:

- * In 1990, the California State University system said it had been assured that new procedures meant that desks and chairs could be delivered in 30 to 60 days: Recently we placed several orders with PIA and have been given unacceptable delivery commitments. For example, we ordered an arm chair and have been given a shipping date [90 days later]. We ordered a chair with arms and an executive chair and were given a delivery date of [four and a half months]. These long lead times for ordering furniture makes it very difficult for us to convince departments to avoid going through the exemption process in order to meet furniture needs. 100
- San Diego State University was angered when dorm furniture needed in September 1992 that PIA was notified about in November 1991 was not delivered on time: It is another black eye for PIA. The shipment still is incomplete, late and required the use of substitute goods, and portions were significantly poorly manufactured. We are told that completion will not be done until January 1993. Of our four recent large furniture orders, only the one done in June 1992 was done well and on time. Further, in my 20 years in this position, that is the only delivery which was fully successful. One in twenty years is not satisfactory. Private enterprise could serve us less expensively, with less hassle and on time. But we are forced to order from PIA. This is not good business for the State of California. 101
- * California State University at Stanislaus found that it took four months merely to place an order: One frustration in dealing with PIA was waiting to receive final waivers and prices...It took a lot of time and effort to get each piece of information from PIA....Our furniture request was first reviewed 1/6/92 and the order was finally processed 5/13/92....In summary, I believe in many instances we can get better quality furniture

at cheaper prices from other furniture manufacturers. Because we have to use PIA (and they know it), I feel the customer service is very poor.¹⁰²

* The Employment Development Department said that PIA needs to stock fast-moving items so they will be available as quickly as private enterprises are able to produce them. "Currently orders are processed as the need arises. Depending on what the prison is making at the time, it can take 90 to 120 days to receive an order." The department also noted that long delays in hearing about the PIA's decision on waivers also holds up procurements, sometimes from two to eight weeks. 103

The PIA has told the Commission it has instituted new procedures to streamline deliveries and smooth out problems with delays, a commitment that echoes the promises made to the university system in the 1989 letter.

Thus, from all indications, many of the PIA's customers feel that prices are too high, quality is questionable and delays are frequent. The PIA, however, believes it does deliver a quality product at a reasonable price in a timely manner. The Commission recognizes that anecdotal evidence may not be conclusive. But if the PIA were in a competitive environment, where departments could choose to buy from either PIA or a private enterprise, the question of PIA's performance would soon be answered by the choices that departments would make. Insulated from the pressure of competing enterprises, PIA has not had to prove that it can deliver, either metaphorically or in reality.

PIA has spotty financial record that fails to reflect subsidies, shifts

PIA is to operate a self-supporting program and provide goods and services to the Department of Corrections, reducing the cost of the operation of the prison system. As far as being self-supporting, the PIA has had a spotty record, operating in the red as often as in the black. But the PIA believes it does reduce the cost of operations for the Department by reducing the need to provide other inmate services and by cutting the length of prison sentences. Overall, however, the true bottom line performance of the PIA is obscured because of hidden subsidies and budget cost shifting that are never taken into account.

According to PIA officials, for the eight fiscal years between mid-1983 and mid-1991 the PIA operated at a loss four times and earned a profit four times. Total sales during the eight years were \$651 million, with an overall profit of \$12 million, or 1.8 percent. The turndown in sales, however, has affected recent profitability: the 1991-92 year ended \$4.5 million in the red.

The marginal degree of the PIA's success in being self-supporting is actually surprising in view of the numerous subsidies and reduced expenditures enjoyed by the agency that a similar private enterprise would not receive. These include:

- * Low salaries for inmate workers. Inmates receive between 25 and 90 cents an hour, or an average of 51 cents an hour. This is substantially lower than the minimum wage in California of \$4.25 an hour, a rate that is typical of fast-food restaurants but far lower than many of the wages earned in private enterprise jobs comparable to PIA jobs.
- * Low rent for facilities. Each enterprise operates on prison property, paying a rental rate of 3 cents a square foot for office and factory space and 1 cent a square foot for warehouse space. Comparable space in Sacramento for such uses runs between 18 and 85 cents a square foot. 104
- * No insurance costs. PIA is covered by the State's self-insurance mechanism, so there is no cost for liability, structural and other forms of insurance.
- * No employee taxes for inmate workers. The PIA does not pay disability insurance, unemployment insurance and other typical employer costs of having a payroll.

The PIA argues that it also faces burdens that add to costs in ways that private enterprise does not encounter. These include:

- * Frequent employee turnover. Prisoners may be moved to other facilities without regard to their work status. Also, many are near the end of their sentences by the time they are hired at PIA because of limited job slots and long waiting lists.
- * Low rate of employee skills and literacy. New employees must be trained regardless of their educational level or ability. While private

enterprise has long complained about the educational readiness of the work force, PIA officials point out that the pool of job applicants they have to pick from is disproportionately weighted with those lacking skills.

- * Scheduling instability. Occasional prison lockdowns where business comes to a complete halt deprives the PIA of a reliable work force.
- * The need for greater supervision than in private industry. This is because of the need for prisontype security, the low level of skills and the rapid turnover.
- * Civil Service requirements for program employees. PIA officials say the world of private enterprise has more flexibility to hire and lay off management staff as industry demands change.
- * Lack of state-of-the-art equipment. Because of both budget restrictions and the desire to have labor-intensive enterprises, the PIA often buys equipment that is less than state-of-the-art. This means that products are produced less efficiently and in a more costly manner.

Balancing subsidies against burdens, PIA should perform better

routinely break even or post a profit is perplexing in light of the ability to set prices without fear of losing customers. The Commission noted that the subsidies and decreased costs should give the PIA a substantial edge over similar industries in the private world -- an edge that would indicate even competitive prices would be profitable for the PIA. No overall total for the subsidies and decreased costs has been estimated; however, PIA officials indicate that raising salaries to minimum wage would cost an extra \$45 million -- a cushion that appears large enough alone to more than offset the burdens enumerated by the PIA.

(The PIA is the target of a lawsuit that would raise the salaries of inmates to the minimum wage, a suit inspired by a federal court decision in Arizona that ruled inmates there should be paid the minimum wage. However, those inmates were working for private firms under contract with Arizona, unlike the PIA employees who work directly for the state enterprises. Also, the Arizona court decision, which is now being reviewed by the 9th U.S. Circuit Court of Appeals, required that the goods produced be circulated in competitive commerce,

a condition which is not true for almost all PIA products. PIA officials expressed optimism about the outcome, citing the differences in the cases and the possibility of the passage of a proposed federal law exempting prison industries from the minimum wage.)

Critics of the PIA, both from the outside and internally, told the Commission that the organization is top heavy with supervisors and that the enterprises are poorly managed. The PIA has 740 non-inmate employees, including 553 safety personnel (guards). However, in relationship to an enterprise with \$150 million in sales, a prisoner employee base of 8,000 and the 24 sites for the separate industries, a large corps of managers and supervisors does not seem unreasonable. The charge of poor management seems justified by the persistent complaints from the PIA customers about quality, delivery and prices. But it is hardly a definitive claim that points the way to reforms and improvements.

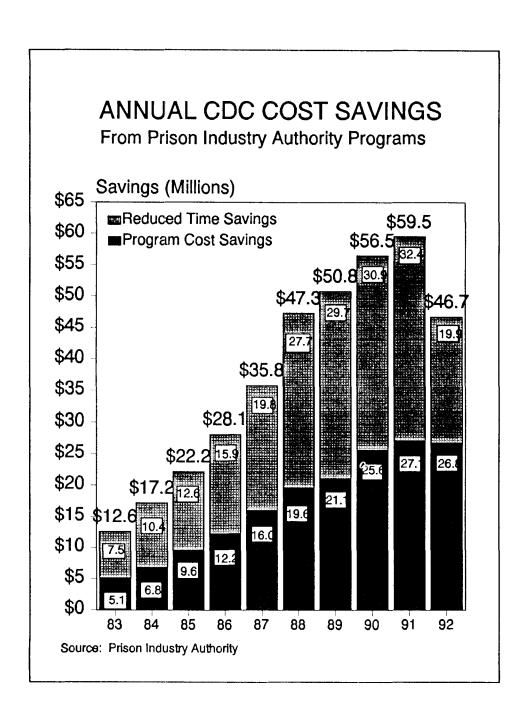
The PIA is aware of the persistent criticism of its performance. Officials are in the process of implementing recommendations from a 1990 management study and a 1989 accounting system assessment. In addition, the organization has been struggling to improve its profitability by eliminating enterprises that are not performing as expected.

PIA claims it saved State \$48 million in expenditures f the PIA's bottom line is difficult to assess, it is no less troublesome than the PIA's claim to saving the State money. "The Prison Industry Authority helps the California Department of Corrections, and therefore the State's General Fund, to control costs and operate more effectively," a PIA handout reads. The PIA estimates that in 1991-92, it saved \$47,895,710 in expenditures by the Department of Corrections. These "savings" came in two ways:

* Reduced time served. Inmates who work for the PIA are given an extra day's credit for time served for each day they work. Even inmates on the waiting list for a PIA job receive partial credit each day. For example, someone who works five days a week for 52 weeks has his or her sentence reduced by 260 days. The early release of prisoners means that the Department of Corrections does not have to pay for their upkeep and security as long. The PIA estimates that \$3,488 per working inmate is saved, for a total of \$26.8 million in 1991-92.

Program cost savings. The Department of Corrections is required to provide employment opportunities, education and other activities for inmates. If the PIA did not exist, the Department would have incurred \$21.1 million in added costs to occupy the prisoners, according to PIA calculations.

The following chart shows the PIA's calculations of money it has saved the Department of Correction's since 1983:



s the chart indicates, PIA's calculations of savings grew steadily until the PIA began to retrench in 1991-92 when sales declined and the number of inmates employed dropped.

While interesting reasoning, the identified "savings" are less convincing when viewed in the context of state government as a whole entity. Neither the reduced-time savings nor the program cost savings hold up well under scrutiny. First, regarding reduced-time: The state's policy makers have set sentencing criteria for various crimes. If the goal is to reduce the time served, thereby saving the money required to house and police inmates, then a far more cost-effective way to achieve it would be to stop sentencing criminals to prison terms or to cut the terms up front. Indeed, other mechanisms in place for reducing sentences may well arrive at the same goal of reducing time served with none of the investment in resources required by the PIA.

Second, regarding program savings: While it is true that the Department of Corrections does not have to fund other activities for inmates busy at PIA jobs, it is incorrect to conclude that state money is therefore saved. The PIA's source of funds is almost entirely from other state departments, most supported by the General Fund and others supported by special fees or taxes. Through the mechanism of forcing these departments to purchase from the PIA, the costs of dealing with inmates are shifted throughout state government but are still paid by the same public-provided dollar that would cover costs if they were contained in the Department of Correction's budget. From the taxpayer's perspective, the cost is there whether it is paid through a share of income taxes that goes directly to Corrections through the budgeting process or through car license plate fees that go to the Department of Motor Vehicles and then are paid to the PIA for finished products.

The PIA also has made no argument that their handling of prisoners allows the Department of Corrections to reduce its security costs. The PIA indicates that its cost of supervising inmates was \$3,688 per inmate in 1991-92. In the same year, the department's cost for security for each inmate was \$10,945. "As to whether the [department's] security cost would increase if inmates would not be working at PIA, the answer is no. Housing units are staffed at the same level whether the unit is in lockdown with all inmates confined to the housing unit, on weekends when

there are no work assignments, or during the normal work time when they are at work assignments whether for PIA or the institution." In other words, not only is the State's cost of guarding inmates not reduced, it is actually increased \$3,688 over what a non-working inmate costs.

A more effective measure of savings would compare prices paid by Corrections he explicit language of the PIA's enabling statute requires it to reduce the Department of Corrections' expenditures, which the PIA attempts to demonstrate through savings in reduced-sentence time and avoided program costs. A far more effective way of determining the value of PIA's program would be to examine the Department of Correction's expenditures for goods and services from the PIA and compare them to what the department would have to spend in the private sector to obtain those same goods and services.

Such a study would be particularly enlightening if the outcome determined that the goods and services provided to Corrections are competitively priced or are actually at bargain rates -- and that the high prices complained of so frequently are on items that shift the costs to other departments and reserve the savings for Corrections. Such an analysis, unfortunately, is beyond the limited resources of the Commission.

Competition with private sector affects jobs and tax base

n analysis that is also beyond the ability of the Commission is a determination of lost tax revenues to the State because of lost private industry jobs. It is this concern that traditionally has limited most prison work programs to only marketing products internally -- but even this limitation does not stop the erosion of what would otherwise be private sector jobs and enterprises.

For instance, the Commission heard from a woman who owns a precast concrete business. In 1986-87, half of her business was with the State. In 1988, after the PIA entered the precast concrete field, she lost 43 percent of her business. "It takes away the tax base and free enterprise," she said. "The quality is poor and the price is high -- and now they're pushing to sell to local governments." 106

The president of a furniture manufacturing and retailing company put it bluntly:

It is insane to fire taxpaying, law-abiding citizens to create jobs for prisoners. Obviously, there is only so much demand

for a particular product. Either a tax-paying Californian produces that product or a prisoner produces it....Government does not belong in business. Why must we compete with our own government? Hasn't our government taken enough already? It is very commendable that California wishes to reform the prisoners, but why should it be at business and labor's expense? [When you talk about PIA saving tax money you] obviously do not take into account the dollars lost in tax revenues from business; the lost taxes from fired employees, whose jobs have been taken over by prisoners; the increased welfare and unemployment money expended on these employees; and the wasted taxpayer money [on inflated prices for goods]. 107

A coalition of business interests called the Inland Empire Economic Partnership sounded similar themes: "This monopoly closes important markets to private enterprise. The result, particularly during the current recession, is lost jobs, increased unemployment, lower sales tax revenue and greater entitlement payments." PIA's General Manager concedes the point:

PIA's inmate employment has an impact on private business. Whether or not the benefits in terms of cost savings, reduction in inmate unrest and returning inmates to society better prepared to earn a living offset this disadvantage is undoubtedly a matter of personal perspective. 108

The Commission recognizes that the concept of prison jobs affecting private enterprise job opportunities has been argued since the inception of prison work programs and has no intention of weighing the philosophical aspects of benefits versus costs. However, the issue is raised here because the effect on the economy and state tax revenues should not be overlooked when claims are presented about the cost-saving ability of programs such as the PIA.

Major PIA goal: provide inmates job training for outside world

n addition to being self-supporting and cost-saving, the PIA has a mission to provide inmates with job training. The law creating the PIA specifically says the program "will create and maintain working conditions within the enterprises as much like those which prevail in

private industry as possible, to assure prisoners employed therein the opportunity to work productively, to earn funds, and to acquire or improve effective work habits and occupational skills."

An examination of the PIA's operations indicate that the program falls well short of matching real-world conditions. Because of a lack of tracking and research, the PIA cannot demonstrate the success of its efforts in giving inmates effective work habits and occupational skills. And without the feedback from such studies, the PIA has no guidance with which to improve its operations.

A substantial constraint on the PIA's ability to emulate a private enterprise is the fact that a major goal is to put as many inmates to work as possible. In the real world, labor is a major component of the cost of doing business, so private enterprises move toward labor-saving devices and cutting-edge technology that will employ fewer people. PIA officials say that enterprises often are set up with antiquated technology purposefully to enlarge the number of employees needed. This means that in many instances, inmates are not receiving job skills that are transferrable to the outside world.

Just as needed in the private sector as skills, however, are good work habits and familiarity with the role of an employee in any organization. Once again, the PIA is constrained from setting up real-world conditions for a variety of reasons, including prison security, a limited pool of applicants and lack of control over hiring conditions. The Department of Corrections retains authority over how inmates are handled, leaving the PIA with little room to set up stable working conditions, according to PIA officials.

For instance, while a few institutions require inmates to fill out job applications and sit through an interview process, most do not, so many inmates do not acquire vital job-getting skills. PIA officials indicated that the hiring mechanism is at the discretion of the institution and, therefore, the Department of Corrections.

Further, there are no criteria or guidelines in place for hiring one inmate over another based on skills, literacy, time left on sentence and other factors. This means that prisoners who already have adequate skills and a good work ethic -- and who therefore have the least to benefit from the PIA -- are just as likely to be employed by the PIA as prisoners who have insufficient literacy or

educational skills to benefit from the PIA program. Apparently only luck determines if someone who could most benefit from job experience ends up with the PIA.

Finally, the fact that inmates are given reducedsentence credit even when they are merely on a waiting list for a job is a reward system unduplicated in the real world.

PIA has no way to measure effectiveness of inmate training espite the constraints and specialized conditions, the PIA maintains it does give inmates experience with the working world. But it has no way to gauge the effectiveness of its own program. The PIA, instead, points to a federal study which shows that work programs in general cut recidivism and increase the likelihood of after-prison employment.

The federal study, conducted over four years, compared two groups of inmates of similar criminal and educational backgrounds, one participating in prison factory and apprenticeship programs and the other not volunteering for job programs. Within one year of release, 10.1 percent of the control group were back in prison, while only 6.6 percent of the working group was. About 63 percent of the inmates in the control group were employed after one year, while 72 percent of the jobsprogram graduates were. The study, however, had no mechanism for adjusting for differences in motivation level, as indicated by the desire of those signing up for job programs versus the unwillingness of those who did not.

PIA officials have said the State's program is similar to the federal prison programs. However, without matching the skills and experiences provided, industry by industry, within the two programs, it is difficult to determine how relevant the federal study is to the PIA.

The PIA indicates that a lack of resources and computer tracking ability makes it impossible for the program to monitor recidivism rates. Similarly, the PIA does not track inmate turnover or length of time on each job, although anecdotal material exists. For instance, at the chicken hatchery in Avenal, male inmates provided the labor force until overcrowding at another institution lead to the transfer of female inmates to the unit used for chicken hatchery workers. This work force subsequently was replaced by males again when the women's facility at Chowchilla opened. The switches took place within the course of one year. In addition, due to the custody level of inmates required for work in the hatchery, inmate

turnover due to releases runs from two weeks to six months on the job.

But solid statistical data is not kept on turnover time. "Maintaining and accumulating such information would be costly and of little value to PIA," the General Manager told the Commission.¹¹⁰ The value of such data, however, would be in shaping programs that better meet the needs of inmates or are more suitable to rapid turnover and low skill levels.

PIA track record: unhappy customers, fuzzy finances, unclear effect he performance of the PIA thus is difficult to gauge. Since its customer base is mandatory, satisfaction with its products and service cannot be judged by its sales volume. Since there are many hidden subsidies, expense savings and budget shifts, it is difficult to determine how effective the PIA is in earning its own way or saving costs for the Department of Corrections. And since no data is tracked on prisoners before or after their release, it is impossible to tell how successful the program is in helping inmates cope with the outside world.

Recommendation 23: The Governor and the Legislature should enact legislation that allows state departments to purchase goods from the Prison Industry Authority on the basis of best value for the department.

services from any entity able to provide the best product at the best price. This competitive environment will force the PIA to operate its enterprises in an efficient manner or to dissolve them. The PIA will still enjoy the benefits of subsidies and cost savings (low rents and wages, for instance) that should more than adequately offset the burdens of such realities as unskilled labor, high turnover and Civil Service rigidity. But the hidden budget shifting that now requires all state departments to foot part of the bill for the inmate work program will end.

Recommendation 24: The Prison Industry Authority should require its annual audits to recognize and document the subsidies it receives.

IA's success in meeting the law's requirement that it be self-supporting should include all factors that affect the program's bottom line, including low rent and lack of insurance payments.

Recommendation 25: The Governor and the Legislature should enact legislation to give the Prison Industry Authority the responsibility of creating a hiring process that reflects real-world conditions.

he hiring process, regardless of institutional location, should include an application and job interview. Relevant standards for hiring priorities according to educational level, job skills and time remaining on sentence should also be created. The aim should be to target those inmates most likely to succeed if given the proper skills and work experience, rather than those who are either least equipped to gain usable skills or those best prepared for work already.

Recommendation 26: The Governor and the Legislature should enact legislation requiring the Prison Industry Authority to report on program outcome statistics.

s computer capabilities on the part of the Department of Corrections become available, the Prison Industry Authority should track employment data and recidivism rates of inmates that pass through its programs. In addition, the PIA should immediately begin tracking the rate of turnover in each industry and length of time on job for all inmates as a way of determining how best to shape and revise existing programs to better meet the needs of prisoners.

Conclusion

Conclusion

o buy \$4 billion a year worth of goods, services and construction activities, the State has set up a procurement process that emphasizes fairness, low cost and achieving a set of social goals. None of these necessarily means that the State gets the best product to meet its needs or maximizes the use of its limited resources. Each of them adds cost (directly or indirectly) and complexity to the procurement process, resulting in delays and inefficiency.

The Little Hoover Commission acknowledges the need for the State to be fair in its dealings with suppliers as it spends public money; to be a comparative shopper in order to stretch dollars as far as possible; and to influence private actions through public policies encouraging small businesses, recycling and cultural diversity. The first priority, however, must be obtaining the *best value*: selecting the product that provides the most benefits for the lowest life-cycle cost. The procurement system should be designed to encourage officials to make best value choices rather than forcing them to focus on the paperwork-intensive process itself.

From this perspective, the Commission examined four areas of procurement: major computer and telecommunications equipment purchases; the protest process; the program designed to encourage minority, women and disabled veterans participation in state business; and the Prison Industry Authority.

High Tech and Best Value

lectronic data processing and telecommunications equipment are particularly difficult to shop for based on price tag alone. There are many different configurations that may address the State's needs, and factors such as customer service, reliability and ability to interface with other systems play a significant role. While the State has acknowledged this by creating a separate set of laws that purports to allow procurement selection based on cost effectiveness, administrative controls and processes hinder its full use. Managers, who supposedly are selected for their positions based on their ability to make good decisions on behalf of the State, are not trusted to use good judgment in meeting the needs of the State while at the same time carrying out the intent of state policies regarding fairness, competitiveness and social goals.

To return responsibility to those making procurement decisions while still stressing accountability, the Commission recommends:

- * Declaring legislative intent that the top priority in any procurement is for the State to receive the best value for the dollars it spends.
- * Empowering those making procurement decisions to base their selections on factors other than cost as long as they provide an open decision-making process and justification for selections.
- * Streamlining the procurement process to avoid costly multiple submissions and evaluations, and to require contract negotiations only with the selected vendor.
- * Involving the Office of Information Technology in the creation of procurement specifications to ensure that they are functional rather than unnecessarily technical and that they fulfill the business purposes outlined in the Feasibility Study Report.
- * Providing training and better informational resources for those who write specifications, manage the procurement process and make decisions.
- * Giving departments discretion to buy equipment (such as copiers, fax machines and postage

meters) that they believe will meet their needs, including reconditioned equipment when warranted.

* Making the process more easily understandable to those who use it by reorganizing statutes and standardizing contractual and billing requirements across all state departments.

The Protest Process

o provide a check and balance on the increased ability of managers to use their judgment in making procurement decisions, the State needs a vigorous protest process that has credibility, both in perceptions and reality, to render fair decisions. The State's present protest process is fragmented, lacks the degree of formality needed to give its decisions weight, and is not perceived to operate fairly.

To address these shortcomings, the Commission recommends:

- * Centralizing and providing uniformity to the bid protest process, including upgrading the technical expertise of those involved in rendering judgments and standardizing procedures for reaching decisions.
- * Creating an alternative independent binding arbitration process to deal with protests that require specialized knowledge.
- * Increasing the perceived fairness of the system by requiring the timely release of all records regarding decisions and requiring documented justification when the State decides to rebid a procurement.

Cultural Diversity

California, state policy makers have created a program intended to expand the participation by minorities, women and disabled veterans in state contracting opportunities. Unfortunately, the program's administration is fragmented and underfunded resulting in a failure to meet legislatively set goals. Particularly troublesome are the program's good-faith effort component, certification process and lack of enforcement efforts.

The Commission believes the MBE/WBE/DVBE program raises expectations that it is not designed to fulfill. Recognizing the sensitive nature of the program and the complexity of ensuring goals are fulfilled without driving up state costs or treating other vendors unfairly, the Commission has laid out an array of options for policy makers to consider:

Option A: Contract for a disparity study that will document past discriminatory practices, identify proportionate remedies and serve as a solid foundation for an anti-discrimination program that falls within the parameters described by the U.S. Supreme

Court.

Option B: Recast the present program so that it operates similarly to the Small Business preference program, granting points on a sliding scale to bidders who achieve various levels of MBE/WBE/DVBE participation.

Option C: Strengthen the present program by centralizing the authority and accountability in one agency and providing adequate resources for educational outreach, certification and enforcement.

Regardless of the path chosen by policy makers for the future of the MBE/WBE/DVBE program, the Commission believes other steps must be taken immediately to address problems, including:

- * Eliminating the good-faith effort process -- or at the very least toughening its requirements so that it becomes the least desirable option for private enterprise, thus encouraging vendors instead to subcontract to MBE/WBE/DVBEs.
- * Abolishing self-certification and setting up a single-point, full certification process.
- * Adopting an aggressive enforcement program, including post-auditing to ensure subcontractors actually were used and paid.
- * Creating a "global" plan that allows companies to qualify as MBE/WBE/DVBE compliant based on their annual internal usage of minority, women and disabled veteran firms.

* Establishing protection for the validity of existing contracts in the unlikely event that the court system invalidates the State's program.

The Prison Industry Authority

ne of the social goals the State's policy makers have set that affects the procurement process is to provide prison inmates with job training and experience with the work ethic. The Prison Industry Authority (PIA) was created to fulfill this goal by employing prisoners and selling the resulting goods and services to state agencies. Despite many hidden subsidies that substantially lower costs for the Prison Industry Authority, state departments -- which are forced to buy the products rather than using private industry -- find the PIA's products overpriced, sometimes of questionable quality and often delayed.

The Commission notes that the PIA has been well scrutinized in previous assessments that have resulted in recommendations for improvements in management, accounting and delivery systems. Despite progress in these areas, poor performance continues to plague the program. The result is the shifting of added costs to other state department's expenditures, an unacceptable outcome at a time when the State is facing extraordinary spending cutbacks and limits on resources.

In addition, to increasing costs borne by other departments, the PIA is also unable to document the degree to which its program is successful in preparing inmates for the outside working world and reducing recidivism. Without such information, the PIA has no guidelines or feedback with which to modify the program to make it more successful.

In light of these considerations, the Commission makes the following recommendations:

- * Allowing departments the discretion to purchase goods from the Prison Industry Authority on the basis of best value.
- * Requiring the PIA to document subsidies it receives in its annual internal audit.
- * Creating a hiring system that reflects real-world conditions to give inmates experience in applying and interviewing for jobs and to target inmates

who are most likely to benefit from work experience.

* Requiring the PIA to report on program outcome statistics and to use that feedback to guide its future programs.

he Commission believes that it is vital for the State to make the recommended reforms on the many fronts described in this report. Only by refocusing procurement efforts on obtaining best value will the State be able to stretch its limited resources and continue to provide needed services to its citizens.

Appendices

- * Appendix A State Procurement Subcommittee and Advisory Committee
- * Appendix B State Procurement Public Hearing witnesses
- * Appendix C California Public Contract Project (1977) Summary of Recommendations
- * Appendix D Excerpts from study of the Utilization of Minority/Women Business Enterprises, Sacramento agencies
- * Appendix E Good-Faith Effort statutes (U.S. Department of Transportation, Oregon and Florida)

APPENDIX A

Little Hoover Commission State Procurement Subcommittee

Arthur Gerdes, Chair Mary Anne Chalker Barbara Stone

Little Hoover Commission State Procurement Advisory Committee

John Lockwood, Director
Department of General Services

John S. Babich, Deputy Director Office of Procurement

Denise Alvarado Special Assistant to the Director Office of Small and Minority Business

Assemblyman Richard Polanco, Chair Assembly Select Committee on State Public Procurement Practices

Legislative Analyst Elizabeth Hill

Sam Yockey, Director Assembly Office of Research

Elisabeth Kersten, Director Senate Office of Research

Kurt Sjoberg, Auditor General

Ward Connerly Connerly and Associates

Merv Forney, Vice President State Operations Division EDS

Ken Dineen Andersen Consulting Ron Grant

CSUS Director of Supply Services

David King, General Manager Prison Industry Authority

John Hillyard, Assistant Vice Chancellor California State University

Ron Joseph Chief Deputy Director of Operations Department of Health Services

Don Harmata Attorney at Law

Bob Hoover
Department of General Services

James Van Loben Sels, Director

Caltrans

Douglas Merritt Pitney Bowes

Joe Radding
Deputy Executive Officer
State Board of Control

James Gomez, Director Department of Corrections

Continued on next page

California's \$4 Billion Bottom Line: Best Value

Tom Lee

Department of General Services

Dan Carter System House

Jack Peyton

Department of Corrections

Paul Dauer

Parker Milliken Law Firm

Steve Kolodney

Office of Information Technology

Donald Featherstun
Pettit and Martin

David Hodges, President National Identification Systems

James Waterman Computerland

Lukman Clark
Director of Public Affairs
Inland Empire Economic Council

Shirley Blase, President Women Construction Owners & Exec.

Karen Sonoda Sonoda & Company

John Lopez, Chairman Association for Service Disabled Veterans

Jean Teng Vettraino, V.P. ARISCO

Mr. Paul Phillips, Branch Manager IRM

Tom Paslay
State Accounts Manager
Rolm

Bill Slaton MLC Group

Gail E. Fitzmaurice, Contracts Manager Intergraph Corporation

Robert G. Holderness, Attorney at Law Robert G. Holderness and Associates

Keith Caldwell
Alliance of Small, Minority and Women
Business Owners

James Taylor Amoros Taylor Wilder

APPENDIX B

Witnesses Appearing at Little Hoover Commission State Procurement Public Hearings

September 23, 1992, Los Angeles

Kurt Sjoberg Acting Auditor General

Merv Forney, Vice President EDS

Ken Dineen Andersen Consulting

John Babich, Deputy Director State Office of Procurement

Steve Kolodney, Director Office of Information Technology

Austin Eaton, Executive Officer State Board of Control

David King, General Manager Prison Industries Authority

November 19, 1992, Sacramento

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G. Kevin Carruth, Acting Deputy Director Department of Corrections

James Waterman Computerland

Tom Paslay Rolm

Wes Franklin, Assistant Executive Director California Public Utilities Commission

Charles Shepherd PG & E

APPENDIX C

CALIFORNIA PUBLIC CONTRACT PROJECT 1977

Summary of Recommendations

RECOMMENDATION 1: All State public contracting provisions should be recodified and reorganized into a single State act both for east of reference by government agencies, the public, and contractors, and to eliminate redundancy and ensure overall consistency in the law. Where appropriate, the statutory language should be redrafted for clarity and simplification.

RECOMMENDATION 2: The State should set forth in accordance with the Administrative Procedure Act uniform contracting procedures and policies in regulatory form rather than in internal manuals to achieve (a) industry input in formulation, (b) visibility to the public and industry, (c) certainty in procurement rules both for industry and contracting officers, and (d) industry participation in policing agency compliance.

RECOMMENDATION 3: The State should prepare a statewide formbook of suggested, but not mandatory, standardized model contract clauses.

RECOMMENDATION 4: An independent commission to systematically review the procurement process and make recommendations to the department should be periodically convened by the Director of General Services.

RECOMMENDATION 5: Civil Code Section 1654 should be amended to read (deletions are indicated by strikeouts): "In case of uncertainty not removed by the preceding rules, the language of a contract should be interpreted against the party who causes the uncertainty to exist.

RECOMMENDATION 6: The balance between the constitutional emphasis on performance of governmental services through a civil service system and the use of services procured by contract should be reevaluated. Categories of services exempt from the civil service preference, such as construction services, should be expressly identified by statute.

RECOMMENDATION 7: A coherent scheme of selection criteria for personal services contracting to include merit, and reasonable and comparative pricing should be developed for use in selecting service contractors and to ensure clarity of the basis of selection and consistency in contractor evaluation and contract award. State policy should emphasize the need for soliciting an adequate number of potential contractors to ensure that the State has the ability to select the most advantageous service contractor. Price should not be excluded as an evaluation factor in the selection of architects and engineers.

RECOMMENDATION 8: Public notice should be published to initiate any personal service contract procurement.

RECOMMENDATION 9: An advance cost estimate should be prepared for any personal services contract as a price objective and any award should be made in consideration of the estimate.

RECOMMENDATION 10: An economic and operational study should be initiated to attempt to determine the effectiveness and cost of and effect on competition from socio-economic programs. The study should focus principally on small and minority business preferences and environmental programs.

RECOMMENDATION 11: Regional preferences should not be applied in the award of public contracts.

RECOMMENDATION 12: The Director of the Department of General Services should be statutorily mandated to adopt protest procedures applicable to all State contracts in accordance with the Administrative Procedure Act (Government Code Section 11370 et seq.) All bid protect procedures should be informal and recognize the need for expeditious and fair disposition. The procedures should include an opportunity for bidders and prospective bidders to confer with the procuring agency. The procuring agency shall respond to bid and award protests with written decisions specifying the grounds therefore and including reference to all documents, communications, data and other information relied on. The statute should authorize imposition of a bond as a condition of protest in unusual circumstances.

RECOMMENDATION 13: A short statute of limitations should be provided to ensure the seasonable presentation of bid protests.

RECOMMENDATION 14: A procuring entity should be afforded a right to expedited declaratory relief in court in order to promptly ascertain the validity of its proposed procurement action.

RECOMMENDATION 15: A participant in a procurement should have a right to a hearing on rejection of the participant or the participant's proposal for all types of competitively procured contracts. The right to submit additional evidence in such a hearing should be limited to issues of the participant's responsibility or the quality for the participant's goods or supplies.

RECOMMENDATION 16: Protests over the award of purchases contracts to other than the low responsible bidder should be removed from the jurisdiction of the Board of Control.

RECOMMENDATION 17: Any participant in a procurement whose response to the solicitation is rejected for any reason, and who otherwise would reasonably have been selected as the successful contractor, shall be entitled to a written determination of rejection stating the grounds relied on by the public entity. If a potentially adverse business impact might reasonably result from the rejection of a participant for a lack of responsibility in responding to a particular procurement, the participant, upon request, shall have the opportunity to know of the basis for such rejection and to augment the agency's record upon which the determination was made, in order to minimize or eliminate such adverse impact whether or not the rejected participant otherwise might have been selected as the successful contractor.

RECOMMENDATION 18: The discretion of the judiciary to direct an appropriate award consistent with law and the terms of the contract solicitation following an aborted award attempt by the procuring entity should be recognized by statute. That discretion should depend on a judicial finding that there is adequate funding for an award at the price proposed by the party properly entitled to the award and a finding that the need for which the procurement was originally undertaken continues to exist at the time of the judicial action.

RECOMMENDATION 19: A right to damages should be recognized for a participant in the procurement process who is improperly deprived of selection as the successful contractor. Recoverable damages should be limited to bid preparation costs, including overhead, and the expense of litigation, including costs and expert fees, if any, necessary to adjudicate the damaged party's entitlement to award. Recovery of lost profits should expressly be excluded as an element of damages in an action for improper award.

RECOMMENDATION 20: Subject to proper controls, negotiations and competitive negotiation should be recognized by statute as valued alternate contracting methodologies in those limited instances where the purposes of competitive bidding cannot be realized.

RECOMMENDATION 21: Brand or trade name specifications when utilized in State contract solicitations should provide for the substitution of equivalent products and the specification should expressly incorporate those saliant characteristics of the brand or trade name product which will be used in determining the equivalency of substitutes.

RECOMMENDATION 22: Proposed substitutions of equivalent products by the low bidder for those specified in brand or trade name specifications should be approved or disapproved prior to contractor selection or award of the contract. An award or a selection of a contractor based on a bid or proposal incorporating substitute items for those specified by brand or trade name in the solicitation for the contract, should be conclusive of the equivalency of the proposed substitute in the absence of gross error.

RECOMMENDATION 23: Where the period available for performance is less than the minimum period necessary for determining equivalency, a procuring entity should be empowered in its contract solicitation to preclude the submission of or equal items.

RECOMMENDATION 24: Government Code Section 4380 should be amended to expressly preclude any contention that a violation of the provisions against trade name and brand name usage would result in invalidating the contract.

RECOMMENDATION 25: A contractor who in good faith performs a contract with a public entity which is void or is subsequently invalidated should be entitled to compensation based on the reasonable value of the contract work unless the contract work can be restored to the contractor.

RECOMMENDATION 26: A standard termination for convenience clause should be developed with appropriate standards of cost recovery and regulations for uniform, though limited, application.

RECOMMENDATION 27: Contract clauses limited liability of the State for delays caused by the State to a time extension should be declared void and unenforceable as contrary to public policy.

RECOMMENDATION 28: A statutory claims forum should be created for the determination of disputes arising form the performance or non-performance of all types of public contracts. The forum should be insulated organizationally from the procuring entity in order to ensure independence. Proceedings before the forum should be entirely de novo and contract provisions purporting to extend finality to the decisions of one party to the contract should be precluded and enforceable. The decisions of the independent disputes forum should be subject to review in the courts and entitled to the same standards of finality as a trial court

division on review to the appellate courts of the State. The disputes tribunal should be exclusive for all judicial proceedings other than bid protests, equitable actions, and actions to review the tribunal's decisions. The jurisdiction of the tribunal should encompass claims by the government against the contractor as well as the reverse.

RECOMMENDATION 29: The requirement for exhaustion of administrative remedies by presentation of contract claims to the Board of Control should be repealed for all contract claims.

RECOMMENDATION 30: A program should be created to provide on-going research and training in government procurement law and procedures. Consistent with the establishment of such a program or contingent on the availability of adequate sources of training programs from private or other government sources, it is suggested that those whose principal function is devoted to state procurement should be subject to continuing education for the maintenance and improvement of the individual's procurement skills.

RECOMMENDATION 31: The recommendations of the EDP Subcommittee of the Study Panel are adopted and endorsed by the panel as a whole for consideration and implementation on the same basis as the foregoing recommendations of the study panel with understanding that Recommendation "b" is intended to be consistent with Recommendation 28 of this report.

Summary of EDP Recommendations

EDP RECOMMENDATION 1: A comprehensive electronic data processing procurement act should be enacted centralizing the contracting and control authority, specifying modes and methods of contracting, mandating the adoption of regulations detailing the scope of discretion and the procedures applicable to the EDP procurement process as well as establishing sample contract provisions.

EDP RECOMMENDATION 2: The Budget Act should exclude limitations, annually integrated as controls on EDP appropriations, in deference to requirements incorporated in the comprehensive EDP procurement act.

EDP RECOMMENDATION 3: Sample contract provisions should be developed to permit flexibility in accommodating various sized procurements and degrees of complexity, contracting requirements, and industry technology, marketing and pricing practices.

EDP RECOMMENDATION 4: Innovative approaches should be developed and explored to ensure that the means of procuring EDP technology necessary or advantageous to government programs are available.

EDP RECOMMENDATION 5: State EDP procurement activities should be focused to stimulate the participation and development of an industry of small EDP suppliers.

EDP RECOMMENDATION 6: Protection from disclosure should be extended to vendor confidential information, including trade secrets and proprietary data, incorporated in responses to contract solicitation by the State by an amendment to the California Public Records Act. Confidential information should be available only on judicial order and as

necessary to adjudicate the propriety of the procurement in conjunction with which it was submitted. On request confidential information should be returned to the unsuccessful competitory who submitted it after selection of a contractor has become final and a contract executed. A provision imposing penal damages for unauthorized use of confidential information should be considered for enactment.

EDP RECOMMENDATION 7: EDP procurement functions should be more centralized.

Summary of Contract Recommendations

EDP RECOMMENDATION A: A clause providing for the presentation and resolution of disagreements concerning the selection process should be incorporating in the solicitation documents.

EDP RECOMMENDATION B: A clause should be included in any contract to provide for presentation and resolution of disputes concerning the performance or non-performance of the contract.

(1) changes and modification in the work to be performed an (2) amendments within the scope of the contemplated system, project or contract as appropriate.

EDP RECOMMENDATION D: Liquidated damages should be provided only if the provisions represents a true liquidation rather than a mere recitation of actual damage. Such a clause should be correlated with a provisions directing extensions of time for excusable causes of delay and should be rationalized with provisions permitting deferral of system installation.

EDP RECOMMENDATION E: A warranty provision should be prepared which reflects the State's need for continuing assurance of performance and complimentary provisions such as up-time availability which encompass similar goals. Warranty obligations should also be correlated to express contract commitments and to the degree to which the vendor and user can affect the warranted performance.

EDP RECOMMENDATION F: Termination for default, and the extinguishment of an agreement for a lack of funding should be recognized. Termination for convenience, if reasonably contemplated and deemed necessary, should be expressly addressed. The rights, obligations, and the extent of the adjustments in each instance should be delineated.

EDP RECOMMENDATION G: Tort or contract liability should be correlated to contract responsibility and should be so limited unless otherwise clearly warranted in the contexts of the entire procurement. Consequential damages should be excluded. Monetary maximums should be considered as a limit on liability, correlated where appropriate to the maximum contract price.

EDP RECOMMENDATION H: Provisions reserving the right to the government to conduct a fiscal audit on appropriate notice should be included to ensure the propriety of adjustments in compensation for terminations, and changes or modifications in contract performance. An audit provision would be an integral part of implementation of the subcommittee's recommendation for greater post-audit controls on the EDP procurement practice.

APPENDIX D

Excerpts from "Study of the Utilization of Minority/Women Business Enterprises,
Sacramento Agencies"
MGT CONSULTANTS

RECOMMENDATIONS

To implement the model M/WBE program, the agencies should take some specific steps to reflect the findings of this study. The recommendations for the four agencies include:

Race-Neutral Methods

- 1. The agencies should continue the race-neutral methods already in place with increased emphasis on effective monitoring and enforcement.
- 2. The agencies should place more emphasis on breaking large projects into small projects which M/WBEs can bid as primes.
- 3. The agencies should waive or reduce bonding and insurance requirements on small projects to enable more M/WBEs to bid.
- 4. As part of the M/WBE certification process, the agencies should provide a detailed listing of existing programs available to assist M/WBEs in the Sacramento area. The agencies should combine forces to develop the listing, rather than duplicating their efforts.
- 5. The agencies should establish a joint certification process where only one agency is charged with all M/WBE certifications. (Such a joint certification agency is used by several local government groups around the country.) Each agency would need to have similar certification requirements to assure M/WBEs would be certified for all local programs. The certification process should, to the extent possible, parallel the federal requirements for DBEs. For those locally certified M/WBEs who also wish to be certified for federal programs, the same database should be used so that only the additional federally required information is requested, rather than starting over from scratch.
- 6. The agencies should establish reciprocal M/WBE certification agreements with other governmental agencies in the Sacramento area. An ultimate goal should be for M/WBEs to be able to go to one location and become certified for every program in the area.

Qualified M/WBEs

 Only M/WBEs which have sought to participate in the jurisdiction should be eligible for the M/WBE programs. M/WBE firms from outside the area must be able to demonstrate that they have attempted to participate in the jurisdiction and are not newcomers. Attempts at participation in the jurisdiction should include such activities as:

- registering as a vendor;
- making a sales call on an agency or prime contractor;
- obtaining a local business license;
- submitting a bid to an agency or prime contractor.

An out of area or newly established firm should be active in Sacramento for at least one year before it stops being a newcomer, and gains eligibility to participate in the M/WBE programs.

M/WBE Classifications

- Only M/WBEs from classifications which have experienced a substantial level of disparity in a business category by an agency should be eligible to participate in that agency's M/WBE program. No goals should be set for non-affected classifications.
- 2. The definition of American Indians for the local programs should only include American Indians. Since no evidence of discrimination against businesses owned by Aleuts or Alaskan Natives was found, those groups should be removed from the definition.
- 3. To avoid double-counting, minority women-owned firms should be classified with their minority designation for local programs. Goals should also be established based on the availability of the combined minority male and female firms for each minority classification and for each business category. It is permissible to track M/WBE utilization for reports and record keeping at a more detailed level, such as tracking Black female professional services firms' utilization.
- 4. The WBE classification should be for non-minority women-owned firms, only. Goals should be established based on the availability of non-minority women-owned firms for each business category.
- 5. For federal programs, the minority and women classification as mandated in 49 CFR section 23.5 should be followed.
- 6. A business size standard or some measure of economic disadvantage should be implemented to direct the benefits of the M/WBE program to those most affected by discrimination. The business size standards used in federal programs would be the easiest to administer and lead to consistency in programs. Use of a size standards will have little effect on the estimates of availability of M/WBE vendors since our date show that almost all M/WBE firms in the Sacramento are small businesses.

- 7. A graduation plan for M/WBEs should be implemented. M/WBE firms should not stay in the program forever. A policy should be established that when a M/WBE firm exceeds the business size standard for a small business, it should graduate from the program.
- 8. The nomenclature for M/WBE classifications should be flexible. The political desires of groups in the area should be considered when settling on the appropriate name for a minority classification.

Goal Setting

- Overall annual goals for each M/WBE classification should be established based on the projected availability of M/WBE firms eligible to participate in the programs for that year. Each agency's Goals Committee should set annual overall utilization goals which should eventually generally align with availability. The projected availability of M/WBEs for each agency for FY 1991/92 is presented in the sections which follow. The overall M/WBE utilization goals provide a benchmark for measuring agency achievements.
- 2. Each year, the overall annual goals for each M/WBE classification should be updated to reflect the projected M/WBE growth rate, utilization patterns, and contracting opportunities. M/WBE availability date should be updated regularly (at a minimum, every five years), especially if major changes in the marketplace occur.
- 3. To provide flexibility, goals on individual projects should be determined based on the availability of M/WBEs for the specific type of work being contemplated, including the subcontractable portions. Upcoming projects should be reviewed on a quarterly basis by a goal setting committee which should include M/WBE program staff and department staff. After close analysis, on some projects, no M/WBEs may be available in a very specialized field, which would result in no goal being set. For other projects, numerous M/WBEs may be available, leading to an individual project goal higher than the agency's overall annual goal for that category.

Flexible Goals - Race and Gender-Conscious Goals Programs

- Goals should be set on a project by project basis by a Goals Committee.
 The chair of the Goals Committee should be the M/WBE program director, with staff from the contract issuing departments included when their projects are discussed.
- 2. Goals should be broken out by minority and gender classifications eligible for participation in each business category based on availability.
- 3. Implementation of goal should be particularly directed at economically disadvantaged M/WBEs.

- 4. M/WBE primes should also be subject to M/WBE provisions for subcontractors, unless the M/WBE prime is performing over 50% of the work with its own forces.
- 5. Local set-asides should not be implemented at this time. Set-asides are quotas which require the agency to allocate a certain portion or the entire project for M/WBE participation exclusively. The courts do not view local set-asides as flexible, and would be more likely to strike down a local set-aside program than a goal program. Local set-asides should be used only after other more flexible methods fail.
- 6. A closely evaluated process should be implemented to assure that non-minority primes make good faith efforts to obtain M/WBEs as subcontractors. A good faith effort committee should review all attempts to prove a good faith efforts and report quarterly on its findings. The specific actions required to establish a good faith effort should be spelled out, including:
 - advertising in the Sacramento Bee (using euphemisms, such as general circulation newspapers may allow primes to circumvent the intent);
 - advertising in newspapers directed at M/WBEs;
 - attending the pre-bid conference;
 - attending quarterly M/WBE forums;
 - inviting M/WBE subcontractors to review the prime's bid specifications without charge;
 - accepting sealed bids from subcontractors, without bid shopping;
 - calling potential M/WBE subs to solicit bids in their areas of expertise;
 - assuring that first tier subs actively solicit M/WBEs as second tier subs;
 - assuring that subs have adequate time to prepare bids;
 - mailing registered letters to M/WBEs who conduct appropriate lines of business to solicit bids.
- 7. The agencies should have policy of waiving the M/WBE subcontracting goals for those firms who affirm that they will conduct all work using their own forces. Although construction firms frequently use subcontractors, professional services and other services firms use subcontractors only occasionally.
- 8. The success of prime contractors in utilization of M/WBE subcontractors consistent with program goals should be a factor in awarding contracts.
- 9. The M/WBE programs should have a sunset provision to evaluate the need for continuing them.
- 10. The goals committee should have the authority when mo M/WBEs are available to bid on a project to waive a goal prior to advertisement.

11. Bid documents for prime contracts should include signed statements form the M/WBE subs that they intend to work on the project. During the project, the M/WBE director should be involved in approving any substitutions of M/WBE subs named in the bid. Sanctions should be imposed on any prime who fails to use M/WBEs as provided in the bid documents.

Flexible Goals - Race and Gender-Conscious Bid-Preference Programs

- 1. The agencies should change existing bid evaluation policies in order to give bid preference points (e.g., 5%) to minority and women-owned firms qualified to participate. The 9th Circuit found that King County's bid preference process was narrowly tailored.
- 2. The agencies should develop a policy to provide bid preference points to majority firms who are engaged in a joint venture with minority and women firms.
- 3. The agencies should develop a policy to provide bid preference points to majority firms who actively use minority and women-owned firms on non-public work and those who mentor or provide other types of assistance to minority and women firms.
- 4. Bid documents for prime contracts should include signed statements from the M/WBE subs that they intend to work on the project. During the Project, the M/WBE director should be involved in approving any substitutions of M/WBE subs named in the bid. Sanctions should be imposed on any prime who fails to use M/WBEs as provided in the bid documents.

APPENDIX E

FLORIDA ADMINISTRATIVE CODE ANNOTATED

TITLE 14 DEPARTMENT OF TRANSPORTATION

CHAPTER 14-78 PARTICIPATION BY SOCIALLY AND ECONOMICALLY DISADVANTAGED INDIVIDUALS IN DEPARTMENT OF TRANSPORTATION CONTRACTS

- c. In evaluating a contractor's good faith efforts, the Department will consider:
- (I) Whether the contractor, at least seven days prior to the letting, provided written notice by certified mail, return receipt requested, or hand delivery, with receipt, to all certified DBEs which perform the type of work in the geographical area of the project, which the contractor intends to subcontract, advising the DBEs of the specific work the contractor intends to subcontract; that their interest in the contract is being solicited; and how to obtain information about and review and inspect the contract plans and specifications.
- (II) Whether the contractor selected economically feasible portions of the work to be performed by DBEs; including where appropriate, breaking down contracts or combining elements of work into economically feasible units. The ability of a contractor to perform the work with its own work force will not in itself excuse a contractor's failure to meet contract goals.
- (III) Whether the contractor provided interested DBEs assistance in reviewing the contract plans and specifications.
 - (IV) Whether the DBE goal was met by other bidders.
- (V) Whether the contractor submits all quotations received from DBEs and for those quotations not accepted, an explanation of why the DBE will not be used during the course of the contract. Receipt of a lower quotation from a non-DBE will not in itself excuse a contractor's failure to meet contract goals.
- (VI) Whether the contractor assisted interested DBEs in obtaining any required bonding, lines of credit, or insurance.
- (VII) Whether the contractor elected to subcontract types of work that match the capabilities of solicited DBEs.
- (VIII) Whether the contractor's efforts were merely pro forma and given all relevant circumstances, could not reasonably be expected to produce sufficient DBE participation to meet the goals.
- (IX) Whether the contractor has on other contracts within the past six months utilized DBEs.
- (X) This list is not intended to be exclusive or exhaustive and the Department will look not only at the different kinds of efforts that the contractor has made but also the quality, quantity and intensity of these efforts.

U.S. DEPARTMENT OF TRANSPORTATION

23.45, App. A

APPENDIX A TO 23.45-Guidance Concerning Good Faith Efforts

To determine whether a competitor that has failed to meet MBE contract goals may receive the contract, the recipient must decide whether the efforts the competitor made to obtain MBE participation were "good faith efforts" to meet the goals. Efforts that are merely pro forma are not good faith efforts to meet the goals. Efforts to obtain MBE participation are not good faith efforts to meet the goals, even if they are sincerely motivated, if, given all relevant circumstances, they could not reasonably be expected to produce a level of MBE participation sufficient to meet the goals. In order to award a contract to a competitor that has failed to meet MBE contract goals, the recipient must determine that the competitor's efforts were those that, given all relevant circumstances, a competitor actively and aggressively seeking to meet the goals would make.

To assist recipients in making that required judgement, the Department has prepared a list of the kinds of efforts that contractors may make in obtaining MBE It is not intended to be a participation. mandatory checklist; the Department does not require recipients to insist that a contractor do any one, or any particular combination, of the things on the list. Nor is the list intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate case. In determining whether a contractor has made good faith efforts, it will usually be important for a recipient to look not only at the different kinds of efforts that the contractor has made, but also the quantity and intensity of these efforts.

The Department offers the following list of kinds of efforts that recipients may consider:

(1) Whether the contractor attended any pre-solicitation or pre-bid meetings that were scheduled by the recipient to inform MBEs of contracting and subcontracting opportunities;

49 EFR Subtitle A (10-1-89 Edition)

- (2) Whether the contractor advertised in general circulation, trade association, and minority-focus media concerning the subcontracting opportunities;
- (3) Whether the contractor provided written notice to a reasonable number of specific MBEs that their interest in the contract was being solicited, in sufficient time to allow the MBEs to participate effectively;
- (4) Whether the contractor followed up initial solicitations of interest by contacting MBEs to determine with certainty whether the MBEs were interested:
- (5) Whether the contractor selected portions of the work to be performed by MBEs in order to increase the likelihood of meeting the MBE goals (including, where appropriate, breaking down contracts into economically feasible units to facilitate MBE participation);
- (6) Whether the contractor provided interested MBEs with adequate information about the plans, specifications and requirements of the contract;
- (7) Whether the contractor negotiated in good faith with interested MBEs, not rejecting MBEs as unqualified without sound reasons based on a thorough investigation of their capabilities;
- (8) Whether the contractor made efforts to assist interested MBEs in obtaining bonding, lines of credit, or insurance required by the recipient or contractor; and
- (9) Whether the contractor effectively used the services of available minority community organizations; minority contractor's business assistance offices; and other organizations that provide assistance in the recruitment and placement of MBEs.

(Title VI of the Civil Rights Act of 1964; sec. 30 of the Airport and Airway Development Act of 1970, as amended; sec. 904 of the Railroad Revitalization and Regulatory Reform Act of 1976; sec. 19 of the Urban Mass Transportation Act of 1964, as amended; 23 U.S.C. 324; E.O. 11625; E.O. 12138) (45 FR 21184, Mar 31, 1980, as amended at 46 FR 23461, Apr. 27, 1981; 52 FR 39230, Oct. 21, 1987)

OREGON REVISED STATUTES ANNOTATED

279.059 Subcontracting to minority or women business enterprise; good faith effort; effect of certification by Department of Transportation; fee

- (1) Whenever a public contracting-agency requires a bidder to subcontract some part of the contract or obtain materials to be used in performing the contract to a business enterprise that is a minority or women business enterprise, the agency shall award the contract, if one is awarded, to the lowest qualified bidder who has met the minority business enterprise or women business enterprise goal established by the public contracting agency or who has made a good faith effort prior to the time bids are opened to comply with the subcontracting or material supplied requirement.
- (2) Performing all of the following actions by a bidder constitute a rebuttable presumption that the bidder has made a good faith effort to satisfy the subcontracting requirement described in subsection (1) of this section:
 - (a) The bidder attended any presolicitation or prebid meetings that were scheduled by the contracting agency to inform minority and women business enterprises of contracting and subcontracting or material supply opportunities available on the project;
 - (b) The bidder identified and selected specific economically feasible units of the project to be performed by minority and women business enterprises in order to increase the likelihood of participation by such enterprises;
 - (c) The bidder advertised in general circulation, trade association, minority and trade oriented, women-focus publications, if any, concerning the subcontracting or material supply opportunities;
 - (d) The bidder provided written notice to a reasonable number of specific minority and women business enterprises, identified from a list of certified minority and women business enterprises provided or maintained by the Department of Transportation, soliciting bids for the selected subcontracting or material supply work, in sufficient time to allow the enterprises to participate effectively;
 - (e) The bidder followed up initial solicitations of interest by contacting the enterprises to determine with certainty whether the enterprises were interested;
 - (f) The bidder provided interested minority and women business enterprises with adequate information about the plans, specifications and requirements for the selected subcontracting or material supply work;
 - (g) The bidder negotiated in good faith with the enterprises, and did not without justifiable reason reject as unsatisfactory bids prepared by any minority and women business enterprises;
 - (h) Where applicable, the bidder advised and made efforts to assist interested minority and women business enterprises in obtaining bonding, lines of credit or insurance required by the contacting agency or contractor; and
 - (j) The bidder's efforts to obtain minority and women business enterprise participation were reasonably expected to produce a level of participation sufficient to meet the goals or requirement of the public contracting agency.
- (3) If a bidder has not met the minority business enterprise or women business enterprise goal established by the public contracting agency, the agency shall evaluate the good faith effort of the bidder consistent with subsection (2) of this section. It shall be a rebuttable presumption that a bidder has made a good faith effort to comply with the requirement for subcontracting or material supply described in subsection (1) of this section if the bidder has acted consistently with the actions described in subsection (2) of this section. It shall be a rebuttable presumption that the bidder did not make a good faith effort if the bidder has not acted consistently with the actions described in subsection (2) of this section.

Endnotes

ENDNOTES

- 1. Office of Procurement, Department of General Services.
- 2. Ibid.
- 3. Ibid.
- 4. Denise Alvarado, Special Assistant to the Director, Office of Small and Minority Businesses, Department of General Services.
- 5. 1991-92 Annual Report, Office of Small and Minority Business, Page 3-11.
- 6. Buyers' Procedures Manual, Office of Procurement.
- 7. Ibid.
- 8. Ibid.
- 9. Denise Alvarado, op cit.
- 10. California Public Contract Project Report (1977), Introduction, Pages 7-17.
- 11. CALNET Briefing Paper, Department of General Services.
- 12. "Audit of the California Network System (CALNET) Acquisition," Auditor General, January 1990.
- 13. Ibid.
- 14. CALNET Briefing Paper, op cit.
- 15. "The Department of Motor Vehicles Did Not Comply With All the State Procurement Requirements," Auditor General, February 1990.
- 16. Ibid.
- 17. "Decision, In the Matter of the Consolidated Bid Protests of National Identification Systems Inc. and Unisys Corporation," Office of Administrative Hearings, N-34855, pages 49 and 63.
- 18. "Ruling on Submitted Matter, National Identification Systems Inc. vs. State Board of Control," Superior Court of California, County of Sacramento, CV364298, January 22, 1991.
- 19. "National Identification Systems Inc. vs. State Board of Control," Court of Appeal, Third Appellate District, C010634, December 1992.
- 20. "Digital Wins Disputed State Contract," Sacramento Bee, January 1, 1993.

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- 22. Office of Procurement, Department of General Services.
- 23. Merv Forney, Vice President of State Operations Division, EDS, in testimony to the Little Hoover Commission, September 23, 1992.
- 24. Steven Kelman, <u>Procurement and Public Management: Fear of Discretion and Quality of Government Performance</u>, Pages 1 and 95.
- 25. Ibid, Page 10.
- 26. <u>Information Technology and Government Procurement: Strategic Issues for the Information Age, John F. Kennedy School of Government, Harvard University, June 1992, Page 25.</u>
- 27. Don Cetrulo, Director, Administrative Office of the Courts, Commonwealth of Kentucky, "The Customer is Always Right," <u>Information Technology and Government Procurement: Strategic Issues for the Information Age</u>, Page 65-66.
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- 29. "In Defense of Best Value Procurement," The Nash and Cibinic Report, August 1992.
- 30. "Buying Best Value Through Source Selection," <u>A Handbook for DLA Contracting</u>
 Offices, July 1990.
- 31. Ibid.
- 32. Sections 10300 and 10301 of the California Public Contract Code.
- 33. Section 12100 of the Public Contract Code.
- 34. Section 12102 (b) (1) of the Public Contract Code.
- 35. Madera Roja de la Secoya, Contractors' State License Board, in interview with Commission staff.
- 36. Eugene Forney, California State University System, in interview with Commission staff.
- 37. Section 1238 of the State Administrative Manual, "Contracts."
- 38. Richard Holden, Chief of Business Operations Planning and Support Division, Employment Development Department, February 21, 1993 letter to Commission.
- 39. Bob Hoover, Acting Deputy Director, Office of Procurement, Department of General Services.
- 40. Merv Forney, op cit.

- 41. John Babich, then-Deputy Director of Office of Procurement (retired on December 31, 1992), in testimony to the Little Hoover Commission, September 23, 1992.
- 42. Tom Paslay, Rolm State Accounts Manager, in interview with Commission.
- 43. "Office of Procurement's Response to Information Technology Customer Council Procurement Committee's Recommendations," Page 3.
- 44. Babich, op cit.
- 45. Steve Kolodney, Director of the Office of Information Technology, testimony to the Assembly Select Committee on State Public Procurement Practices, January 26, 1993.
- 46. Robert J. Schoner, Aerojet Director of Operations Development, in testimony to the Assembly Select Committee on State Government Procurement, January 26, 1993.
- 47. EDP Acquisition Unit Procedures Manual, Office of Procurement, Attachment 6, Page II-6.
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